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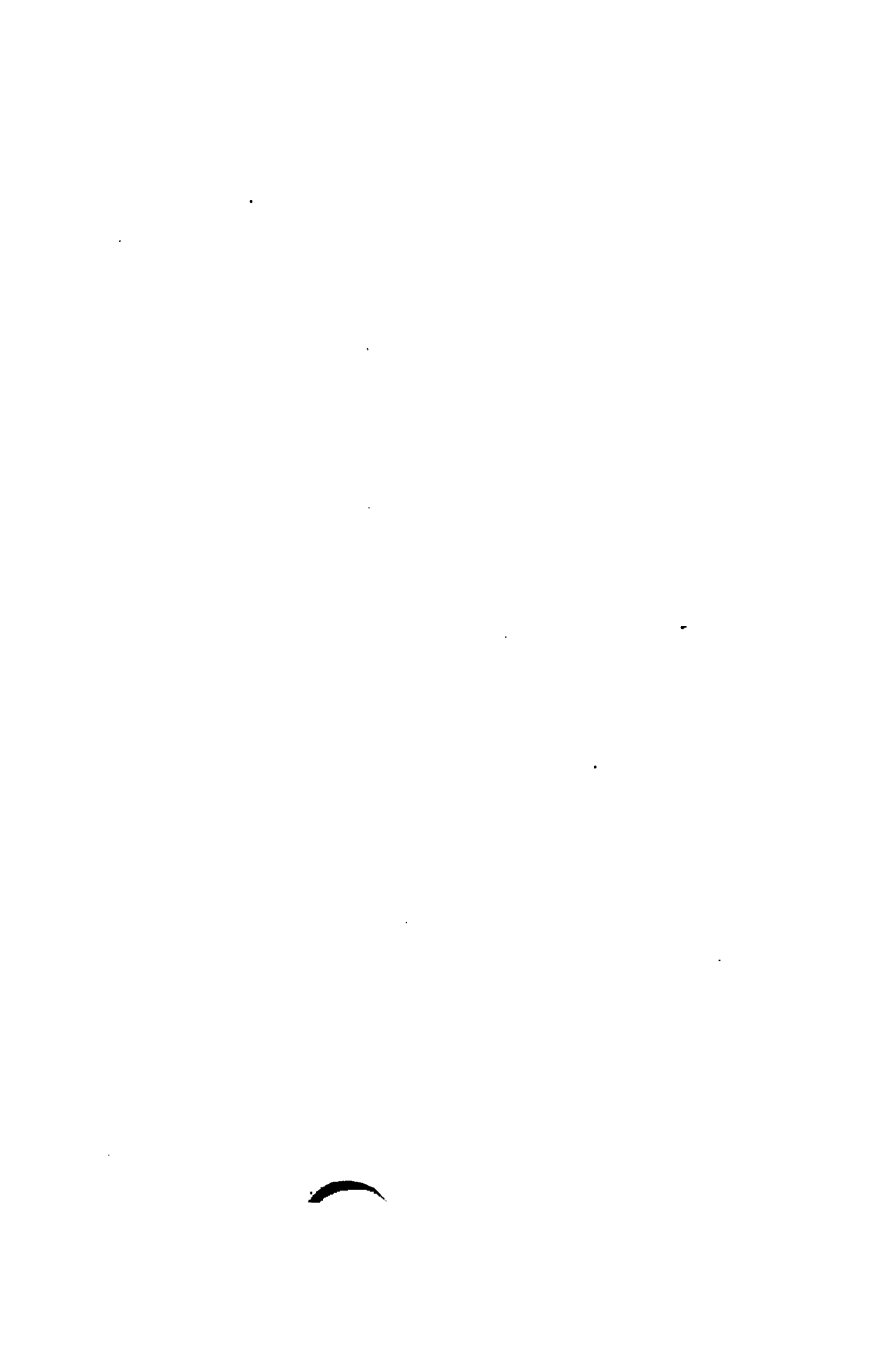


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A REVIEW
OF
THE PRINCIPAL FACTS
CONNECTED WITH
THE RISE, PROGRESS, CONCLUSION,
AND CHARACTER
OF THE
RECENT STATE PROSECUTIONS
IN IRELAND :

INCLUDING AN EXAMINATION OF THE MOST IMPORTANT OF THE DECISIONS
AND OPINIONS OF THE JUDGES IN BOTH COUNTRIES, AND OF THE
JUDGMENT OF THE HOUSE OF LORDS.

BY A BARRISTER.

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every other ground; and that any prosecution which might have been instituted for the purpose of directly stamping a character of illegality upon any one of them would have altogether failed in accomplishing that purpose. In the earlier part of his reply, the Solicitor General expressed himself upon this subject in the following words:—

“They,” the counsel for the traversers, “might have spared themselves the observations about Mr. O’Connell’s exhortations not to commit any crime—about *no persons being alarmed for his personal security*, because we,” on the part of the Crown, “do not say that **ANY ONE** of those meetings, as far as that matter is concerned, *would have been open to prosecution*. Suppose we had prosecuted the persons who had attended one of these meetings for being present at an unlawful assembly, what would have been the defence—and the triumphant defence? That the meeting *terminated peaceably*; that though *numerously attended*, it *did not cause any alarm to the public*; and that the parties met for the ostensible purpose of petitioning the Legislature for the repeal of an Act of Parliament. *That defence it would have been IMPOSSIBLE for us to meet*; and if we had prosecuted in such a case, we should have been *deservedly defeated*.”*

Here, then, is an express, unequivocal avowal by the Solicitor General that the object of the defendants, “the repeal of an Act of Parliament,”

* Flan., p. 405.

was legal in itself*, and that the meetings, which were the means by which that object was to be accomplished, were, when considered in themselves, as legal as the object. "But," says the learned gentleman, "when the existence of a conspiracy has been established, then each meeting which, considered by itself, would be a lawful assembly, becomes illegal as a link in the chain of the conspiracy." But what is the proof of the conspiracy itself? "The conspiracy," says the Solicitor General, "is here evidenced by the number of meetings which took place, and by the continuity and unity of purpose which was evinced at each meeting, and which rendered every one of them a link in the conspiracy!" Elsewhere† he says, "You will also find, from the holding of those multitudinous meetings, that all this places beyond a doubt the intention of these parties." So that the holding of the meetings is lawful until the existence of the conspiracy is proved, and the proof of the existence of the conspiracy is the holding of the meetings! The meetings are declared to be unlawful as the result of a conspiracy, and the conspiracy is deduced from the holding of the meetings, which are lawful in themselves. One meeting to petition for the Repeal of the Union is lawful, but the

* We are prosecuting them for combining to obtain an end *which is NOT ILLEGAL in itself*.—*Reply of the Sol. Gen., Flan.*, p. 414.

† *Flan.*, p. 445.

holding of several shows a continuity and unity of purpose, and is thereby evidence of a pre-existing conspiracy; and the first meeting, which was lawful when it occurred, and for a long and indefinite period afterwards, becomes for the first time unlawful after the holding of the others—becomes retrospectively unlawful by relation to succeeding and contingent occurrences; and the parties who had originally convened and attended a lawful meeting, assembled for the attainment of a lawful object, are liable to be prosecuted *nunc pro tunc*!

If the meetings are so few as not to produce upon the Government or the Legislature any impression of the propriety of conceding the object in question, the meetings will, it seems, be lawful; they will not be liable to any imputation of illegality as long as they do not show that the purpose in view is desired by a large proportion of the population. If the first assembly of 100,000 persons should not have advanced the cause for which they met, the meeting was, it seems, in conformity to the law; but if in order to prove the universality of the desire for the alteration, successive meetings be convened in various places, as they all come together for the same purpose, this fact is held to be quite enough to show a unity of object, and the unity shows the conspiracy, and then the conspiracy proves the illegality! “It is only necessary,” says the Solicitor General*, “to show “that each defendant in his way was labouring to

* Flan., p. 410.

“effectuate a common object ; and that evidence “being given, the jury are at liberty to infer the “existence of a conspiracy.” But as the conspiracy is proved by merely proving a series of meetings, the conspiracy itself becomes unnecessary to the final conclusion ; and any meeting, however lawful its general object may be when the meeting is held, will have become *retrospectively* illegal if it happen to be followed by other meetings of the same nature, each lawful in itself !

A series of meetings, according to the Solicitor General, becomes evidence of a conspiracy, as they denote a continuity and unity of purpose. If, instead of frittering away their energies in driftless, desultory, and unconnected efforts, the parties make arrangements for exciting, collecting, and expressing the public opinion upon the given subject, and if for this end they adopt means whereby the public attention may be for some considerable period concentrated upon the subject in view, they then disclose such a unity and continuity of purpose as proves them to be conspirators, and therefore proves the illegality of all the separate meetings, which were quite legal before ; meetings can be legal only in proportion as they have no tendency to effectuate the object for which they were assembled ; and the general result of the whole matter must be, that the conduct of all persons who engage in such proceedings must be characterised by inutility or illegality.

Before we quit this part of the subject we must

refer to an authority, the only one which was quoted by the Solicitor General in support of his reasoning, and which was taken from the case of *Redford v. Birley*.* “An unlawful assembly,” says the authority, “is in any case where persons meet “together in a manner and under circumstances “which the *law does not allow*, but makes it “criminal in those persons meeting together *in such “a manner knowingly, and with such purposes as “are in point of law criminal.*” The meaning of this profound, elaborate, and very luminous definition seems to be, that an assembly will be against the law if the law is against the assembly. And such being the exact value of the authority, it seems most wonderfully appropriate to the doctrine which it is adduced to support.

Having arrived at the conclusion of the illegality of the meetings by the very singular process of reasoning which we have described, the learned counsel felt, however, that he had not advanced very far in justifying the form of the prosecution, and he accordingly endeavours to apologise to the public in the following manner:—“But it is right “that I should also disabuse the public with respect “to another objection which has been urged against “the proceedings in this prosecution. It is said, ‘If “‘these meetings were unlawful, why not prosecute “‘them *as such* ? And if you can now show that “‘such a meeting was unlawful, even with reference “‘to its purpose, why not indict the parties present

* 3 Starkie, Nisi Prius Cases, 102, 103.

“ ‘at that meeting for attending an unlawful assembly ?’ Now,” says the Solicitor General, “in the first place, being persuaded that this combination which we charge did, in point of fact, exist, and feeling it to be our duty not to prosecute the inferior and subordinate instruments by whom, and through whose intervention, the purposes of that combination were sought to be effected, but that we ought at once to bring forward the heads of it to a trial; feeling that to be our duty—the *bold, straightforward, and manly course to be pursued—we saw THAT THAT COULD NOT BE DONE EXCEPT THROUGH THE MEDIUM OF AN INDICTMENT FOR A CONSPIRACY.*”*

This appears to be a distinct and most deliberate confession that the mere facts of the case would be wholly unavailing for the purpose of procuring a conviction, without introducing them to the court and the jury in conjunction with a theory which we have already shown, out of the mouth of the Solicitor General himself, to be a fiction, and an imposition, “a delusion and a snare:” that in order to show the separate acts of the defendants to be illegal, it was necessary to construct the framework of an inferential and imaginary conspiracy for the purpose of exhibiting real but lawful occurrences in such a connection with inferred and assumed illegality of design as should make them appear to be unlawful. The authors of the prosecution had, no doubt, very important reasons for pursuing

* Flan., p. 406.

this course, and the course itself may be entitled to be called effectual for the attainment of its real purpose: but what there is in it “bold, straight-forward, or manly,” that public, to “disabuse” which this explanation has been given, will, we think, find it very difficult to perceive. The object of the whole prosecution, professed and declared by the Ministry, the Irish Court of Queen’s Bench, and the Counsel for the Crown, was the punishment and repression of the monster-meetings, of which *forty-one* took place in the course of the year 1843, between March and October. But the prosecution was not commenced *until after the FORTY-FIRST meeting had been holden*. This, however, was perhaps in consequence of its being supposed by the Crown prosecutors that such was the “bold, straightforward, and manly course “of proceeding.”

In another place the Solicitor General observes*,
 “But a meeting may be unlawful, because it has
 “an unlawful object — because it is the means
 “resorted to to bring about an unlawful end: and
 “until you know what that end is—till the fea-
 “tures of the conspiracy to which that meeting is
 “auxiliary are fully developed and disclosed—
 “nay more, until they are capable of legal proof
 “in a court of justice — until *that moment arrives*
 “it is *impossible* to show that *any one meeting* held
 “for that purpose *is an unlawful meeting*. But
 “when circumstances have occurred which show

* Flan., p 405.

“ the purpose kept in view all along by the parties
 “ who caused that meeting to assemble—when that
 “ purpose is clearly demonstrated by their subse-
 “ quent acts as the conspiracy advances towards
 “ its consummation, then *the original meeting, which,*
 “ *standing by itself,* and unaffected by reference to
 “ the whole conspiracy, *could not be prosecuted as*
 “ *illegal; becomes AT ONCE unlawful.*”

This is certainly a most marvellous declaration. In the passage which we have cited, the Solicitor General was, to use his own language, “ explaining “ to the jury why the prosecution had been delayed “ until the period when it commenced ;” and he assigns as the reason of this singular “ delay of “ justice, that it would have been *impossible* at an “ *earlier period* to adduce the *necessary proofs* of “ the *illegality* of the meetings.” Is it possible to conceive that, supposing the first meeting to be unlawful, he possessed no evidence of its illegality until after the holding of the *forty-first*? The first meeting of the Association which was given in evidence was holden in Dublin upon the 13th of February. The first monster meeting was held in Trim on the 16th of March, and the last of the multitudinous meetings was held at Mullaghmast upon the 1st of October. Is it possible to believe that there was no evidence of the illegality of the meeting in Dublin until after the meeting in Mullaghmast — no evidence of the illegality of the meeting in February until after the meeting in October? The informations upon which the indict-

ment was presented were founded upon the meeting at Mullaghmast, which occurred on the 1st, and the meeting at the theatre in Dublin, which took place on the 8th of that month, and must therefore have been sworn between the 9th and the 14th, upon which latter day the defendants received the first official notice of the prosecution. Is it possible that until the 9th of October the Crown had no evidence to support a charge of illegality against the meetings of the 13th of February or the 16th of March? If this be so it is quite clear that if the meeting at Mullaghmast and that which was held in Abbey Street had not been holden it would have been impossible to prosecute the defendants in respect of any of the antecedent meetings, and that the allegation of a conspiracy on the 13th of February would pass for a mere falsehood.

The law officers, it seems, held back until they had evidence which must "coerce" * any jury into returning a verdict of guilty. "But," says the Solicitor General, "*when* we found, from certain proceedings, what those parties really had in view, it *then* became our duty to vindicate the law." The prosecution was, it seems, commenced as soon as the prosecutors found out what were the views of the defendants. But the "proceedings" from which the prosecutors inferred those views took place with an unparalleled publicity in presence of hundreds of thousands of persons upon Sundays and holidays, and were attended by policemen and

* *Flan.*, p. 405.

stipendiary magistrates, and official persons of all sorts, as well as by reporters engaged not only on the part of the Crown, but of all the most considerable newspapers in the empire, by whose agency the whole of the "proceedings" were continually communicated to the public with the greatest minuteness and particularity. The only "proceedings" given in evidence at the trial were those occurrences which were previously known to the whole world: and "the great deal of time and "trouble required to collect the evidence" * was simply commensurate and co-extensive with the time and trouble required for reading the public newspapers which contained the statements that were given in evidence upon the trial. The simplest credulity revolts against admitting the belief that until the month of October, 1843, the Government were "not possessed of the evidence necessary "to prove the illegality of the 'original' meeting "which took place in February, if the meeting was "illegal;" or that until some time shortly antecedent to the commencement of the prosecution they did not "find out" the "views of the defendants," as evidenced by their "proceedings," and that it was only after something which happened in the county of Meath in the month of October, that the Government became definitely convinced that the defendants had entered into a conspiracy on the 13th of February, in the city of Dublin. Yet this most incredible state of things appears to

* Page 405.

be expressly asserted in the charge of the Chief Justice himself.*

But if it be true that the Government required this prodigious period of observation for the purpose of ascertaining the real character of occurrences which were much more notorious than the proceedings of the Government itself, what is to be thought about a conspiracy which is said to have been formed in February, but which required a period of eight months to discover, or rather to deduce; although all the sagacity and industry of all the available ingenuity in the service of the Crown was continually applied to the purpose, and although the acts from * which the conspiracy is inferred were as public as common daylight; being, indeed, the same sort of acts which the more important of the parties had been continually doing for the greatest portion of their antecedent lives? For our own parts, we believe, — as we think, that all candid persons acquainted with the facts of the case will believe — that, whatever may be the legal demerits of the several defendants, the conspiracy was a fiction of the most extravagant and improbable nature; that it was a “delusion and a snare” used for several and contradictory purposes, — employed at one time to attach to legal meetings a character of illegality, at another made an excuse for conniving at proceedings now for the first time alleged to have been unlawful when they occurred; and used all through the prosecution as the means of introducing

* Page 140—1. of the authorised edition.

an enormous mass of general imputations, that would never be admitted in support of an indictment which *charged any individual with any distinct, substantive, and palpable offence* against the law.* Instead of grappling with each of these alleged illegalities, and making it the object of a separate prosecution, it was, no doubt, and for good reason, considered a safer plan to reserve them all for the final composition of a *general charge, constructive and accumulative*; the multitudinous and heterogeneous character of which would, in all probability, overwhelm the defendants by the *vastness of the details, the enormity of the expense, the inutility to the defendants of proving the lawfulness of the separate acts complained of, and the impossibility, in such circumstances, of giving any direct evidence to disprove the conspiracy itself.*

Upon the unconstitutional and oppressive nature of such conduct it is unnecessary to make any comments. Indeed, it appears that even the stern genius of military law itself abhors this practice of accumulative accusation. Lord Woodhouselee, in his essay upon that subject, has the following observations†:—"The military law, whilst it authorises every measure necessary for the punishment of offenders, is most strictly watchful to obviate

* Each of the defendants filed an affidavit upon the 16th of April, about six weeks before the sentence, explicitly denying the charge of conspiracy. One of these, that of Mr. Tierney, is given at length in the Appendix, p. 1.

† Essay on Military Law, p. 160.

“ every possible means of oppression, and to guard
 “ the administration of justice from every taint of
 “ malice or of private resentment. The Mutiny Act,
 “ therefore, with equal wisdom and humanity, pro-
 “ vides that offences which, at the time of commis-
 “ sion, have been deemed of too slight a nature for
 “ prosecution, shall not, *when the evidence of exculp-*
 “ *ation or alleviation may chance to be weakened,*
 “ be lodged as matter of arraignment against the
 “ offender.” He then dwells upon the want of
 candour and equity which is exhibited in passing
 over at first the original deviations from duty for
 the purpose of afterwards, when the offender has
 been tempted to the commission of greater trans-
 gressions, bringing the original offences forward,
 either in aggravation of the offender’s guilt, “ or,
 “ *as has been too frequently done, to make them* PARTS
 “ OF ONE ACCUMULATED CHARGE *against him.*”

The following note is appended to the text of Lord
 Woodhouselee by the editor of the third edition of
 the work : — “ Of a procedure of this kind, which
 “ had occurred on two trials held at Edinburgh in
 “ March, 1798, viz. that of Captain John Cameron
 “ and Captain and Adjutant John Roy, on a
 “ variety of charges, the King expressed his
 “ pointed disapprobation in the following terms :—
 “ ‘ *His Majesty*, adverting to what has in some
 “ ‘ measure appeared in the course of both these
 “ ‘ trials, has expressed his *extreme disapprobation*
 “ ‘ *of keeping charges against an officer or soldier*
 “ ‘ IN RESERVE *until they shall have ACCUMULATED,*

“ ‘ and then bringing them before a general court-
 “ ‘ martial COLLECTIVELY ; whereas every charge
 “ ‘ should be preferred at the time when the fact or
 “ ‘ facts on which it turns are recent, or, if know-
 “ ‘ ingly passed over, ought not, either in candour
 “ ‘ or in justice, to be in future brought into
 “ ‘ question.’ ”

The third edition of Lord Woodhouselee's Essay, from which the above-given extract is taken, was dedicated to King George the Fourth, and edited by Major James, the well-known author of the “ Treatise on Courts Martial,” the “ Military Dictionary,” and other works on military subjects.

But after all the explanations of the Solicitor General, people would still naturally wonder a little why it was, *if* the meetings in question *were* illegal, *no matter upon what grounds*, the law officers of the Crown did not venture to raise the question of illegality *upon the record*, even *in conjunction* with the conspiracy. Those learned persons repeated often enough, *ore tenus*, that the meetings were illegal ; and so said — *ore tenus* — every judge of the Irish Court of Queen's Bench ; and the Solicitor General himself expressly stated that the “ great question which “ they wanted to try was the legality of the meetings.” But every man who attends an illegal meeting is liable to be indicted and punished for such attendance ; and the established method in England of proving the illegality of a meeting is through the medium of such an indictment. In

order to "disabuse the public" upon this point, the Solicitor General observes, "If we had included counts for attending an unlawful assembly, as it is said that we ought to have done in the indictment for a conspiracy, we should have exposed ourselves to the risk of being defeated upon technical grounds; because it has been decided that if you include in an indictment several defendants upon a charge of conspiracy, and also upon a charge for attending an unlawful meeting, and you fail to prove that *all* the defendants attended that meeting, *you must elect between the two charges, and cannot proceed upon both.*" But if the counts *had been* introduced, and the question of the unlawfulness of the meetings had been directly raised for discussion and adjudication, it is clear that the prosecutors in that instance, like the prosecutors in every other, would only fail in consequence of being unable to prove the case which they had stated upon the indictment. Of all the elemental ingredients which can enter into the composition of any offence, the corporal presence of an individual at a public meeting, in the proceedings of which he is prominently engaged, must be the most easy to establish in proof, as it is the most obvious and simple in itself. If, therefore, "you fail to prove that all the defendants attended the illegal meeting," *you succeed in proving that you ought not to have put them all upon their trial, and that you have attempted to punish some, at least, of them for an*

offence of which they were not guilty, and from the imputation of which they ought to be acquitted as a matter of course and of right. Such a failure, however undesirable to a public prosecutor, must always be very desirable to the public at large, who have the deepest interest in the pure and impartial administration of justice.

But the escape of a few innocent individuals would not after all, it seems, be the worst consequence of such a conjuncture of affairs as we have been describing. The most disastrous result would, according to the Solicitor General, be the necessity of electing between two charges, and the not being able to proceed upon both at one and the same time. In order, therefore, to be able to *accumulate imputations, and to conduct the prosecution in a circle*, it was necessary to have the power to shuffle the meetings and the conspiracy together, so that the existence of the meetings may be used to prove the existence of the conspiracy, and that the existence of the conspiracy may be used to give a character of illegality to the meetings. The facts were wanted to give plausibility to the fiction, and the fiction was required to brand illegality upon the facts; and the necessary consequence of separating those two indispensable parts of the machinery would be to produce in this case a defeat, "as deserved," as, according to the Solicitor General himself, must have resulted from attempting to prosecute *any one* of the meetings for illegality. The

difficulties which would arise from the necessity of election were, therefore, and very truly characterised by the Solicitor General as insuperable — altogether insuperable, no doubt, in consequence of the fact that *the conspiracy was a mere fiction* invented for the purpose of giving the character of illegality to the meetings, whilst the meetings—to use the language of the Solicitor General — were to be represented as “the links,” “the means,” and “the proofs” of the conspiracy.

The Solicitor General tells the jury that according to the common law every offence must be tried where it has been committed. “For that reason,” says he, “*you* could not try Tara, Lismore, Mullagh-mast, or Mullingar.” What then? The meetings in question would be tried by the proper juries — *proper* in every sense — of the respective counties where they were holden. Was it a necessary part of the arrangements of the Crown that the trial should be by *that* jury in the city of Dublin? This was certainly one reason for adopting the conspiracy. A better, however, is that which has been already given by the learned gentleman himself, namely, that any prosecution of any single meeting for illegality would be “*triumphantly answered, and deservedly defeated.*” A jury of the city of Dublin, by the help of a mass of diffusive, cloudy, and exaggerated imputations, may be induced to find the defendants guilty of the shadowy, constructive, and indefinite offence of conspiracy; whereas no

jury, much less one of the *neighbourhood*, could be expected to have the effrontery to pronounce a meeting illegal when *the very evidence for the prosecution had not only proved the total absence of all the circumstances which had ever been considered as the characteristics of illegality*, but absolutely demonstrated that the most sedulous and extraordinary efforts had been successfully made to prevent the existence of any pretence for imputing to the meeting that it had been in any respect in opposition to the law.

For these reasons it was necessary, for securing a conviction, to throw a drag-net about the defendants in the county of the city of Dublin, by alleging that upon the 13th of February, of all days in the year, “at the parish of St. Mark, in the “county of the said city, they did combine, con- “spire, confederate,” and so on; by which “ingenious “device” every question about the character of the meetings *was withdrawn from the consideration of the jurors of the counties where the meetings were holden respectively*, where their peaceable and unalarming character, now expressly and universally admitted, was perfectly well known to the whole population, and where any attempt at branding them with the imputation of illegality would be scouted with derision by the whole population of all political parties. The conspiracy, however, being laid in the indictment, the meetings were admitted in proof; and amongst the defendants charged with having conspired on the 13th

of February to convene the meetings was the Rev. Mr. Tierney, who never attended any of them, whose *first entry into the Repeal Association was exactly EIGHT MONTHS after the day when he was said to have conspired*, and who, through the “bold, straightforward, and manly course” of a fictitious, inferential, and theoretical conspiracy, was made responsible for *hundreds of transactions* in which he had no actual participation*—the transactions of an association of which he was not a member, and of individuals with whose conduct there was no reason to presume that he was in any manner acquainted, except through the statements which were publicly made upon the subject in all the newspapers of the empire.

The Solicitor General, in his efforts to “disabuse the public” upon this point, says †, “We are not to be taunted with having adopted the contrivance of an indictment for a conspiracy, or with having *brought the actions of one man to bear upon another*—we do not visit one man with the guilt of another, but we visit on him the legal and inevitable consequences of his own act,” &c. In another passage he says ‡, “We are seeking to charge one man with the *act* of another, but not with the *guilt* of another.” This is mere quibbling of the most sophistical character, and is as contradictory as it is ludicrous. § Mr. Tierney is,

* See p. 166—173 † Flan. p. 447. ‡ Ibid. p. 411.

§ We request the reader to apply this and all other observations of the same nature, not to the talents, character, or

it seems, rendered responsible only for the consequences of his own act. But he is made responsible for all the speeches, writings, and actions, not only of all the other defendants, but of a great and indefinite number of other persons, during the seven or eight months before the 3d of October, on which day he became, for the first time, a member of the Association. Were all those actions, writings, and speeches, the enumeration of which occupies fifty-three pages of print, and of the largest folio size, and which took place before he joined the Association, the consequence of his act in joining it? To assert this directly would be too ridiculous, and recourse is therefore had to the theory of a *self-assumed retrospective criminality*, which, in the circumstances of the case, is as great an outrage upon law as it is upon justice and common sense. The following extraordinary passage upon this subject is taken from the charge of the Chief Justice to the jury*: “In reference to Mr. Tierney I shall put this question to you, — If you are satisfied that he did then join them, did he, at that time, on the 3rd of October, *adopt the Association as it stood, WITH ALL ITS*

conduct of the Solicitor General, for whom we entertain a very sincere respect, but to his argument, which was the consequence of his position. We have taken his reply as the principal ground of our observations, for the very obvious reason that it was the only address upon the part of the Crown which deserves any notice at all; the opening speech of the Attorney General being a mere series of the fragments of the evidence to be adduced upon the trial.

* Page 451.

“ CRIMINALITY! (*if* such existed), *as it did then exist!*” As the jury found Mr. Tierney guilty, they must of course have been satisfied that “ on the 3d of October he adopted the Association as it stood, with all its criminality, *if* any such existed at the time!” There is something in the last degree ludicrous about this idea of a man’s taking an Association for better for worse, and wedding himself deliberately and desperately to a body which he actually knows to be eight months gone with ready-made criminality; and the most curious part of the principle is, that a man may involuntarily adopt this precious “*infant in ventre sa mère*” without being even aware of its existence.*

In putting this question to the jury, the learned Chief Justice professed to consider himself justified by the case of *The Queen v. Douglas and Murphy*†, in the course of which Mr. Justice Coleridge is represented to have said that “ if a conspiracy is already formed, and a person joins it afterwards, he is “ equally guilty.” Mr. Justice Coleridge himself has frequently stated, and very recently, in the case of *The Queen v. the Trustees of the Taunton Market*, that these general expressions are always to be understood with some reference to the case before the Court. In the case of *The Queen v. Douglas and*

* See *infra*, Appendix, p. 1., the affidavit of Mr. Tierney, in which he states that, with one droll exception, he had had *no communication whatever, by writing or speech*, with any of the other defendants, from the 13th of February to the 13th of October.

† 8 Car. & P. p. 300.

Murphy, the offence which the defendants were charged with conspiring to accomplish *was one act of resistance to the levy of a church-rate*. Both defendants, on the 27th October, published a hand-bill, denouncing, to the dislike of the parishioners, the collector of the rate, and recommending resistance. *On the same day* the collector *was* resisted by a man of the name of Wall, who was taken before a magistrate for the offence on the 3d November, upon which occasion *Douglas became his bail, and Murphy assisted in his defence*. The whole occurrence was a single transaction, occupying a few days, and the two defendants had evidently and expressly adopted the act of Wall and the acts of each other. They *previously* publicly, avowedly, and *conjointly* recommended a breach of the law; and when this recommendation was acted upon, they *conjointly* and avowedly, in their several ways, aided, assisted, and abetted the person who so committed, upon their suggestion, an undoubted illegality. What earthly resemblance is there between such a case and that of Mr. Tierney and his imaginary adoption in October of the imaginary conspiracy said to have been formed in February? The statement for the prosecution by Mr. Thesiger, in the case of *The Queen v. Douglas and Murphy*, occupies only half a page of a loosely-printed octavo, there being to be stated only one occurrence in which not only the two defendants participated, but which *was ORIGINATED conjointly by themselves*. There neither was, therefore, in fact, nor could possibly have

been any *question* at all in that case of *adoption*; and the observation of Mr. Justice Coleridge, *if he really made it*, had no more connection with that case than the case itself has resemblance to that of *The Queen v. O'Connell*. Yet the Chief Justice leaves altogether out of view the total absence of any resemblance between the particular natures of the two cases, whilst he extracts from one of them a passage which is both general and extra-judicial, and which was so far from being sufficient as an authority to decide the ridiculous question of adoption in the case of Mr. Tierney, to which it was applied, that it had not even any connection with the case in which *it is said* to have occurred. It may be added, that in the case of *The Queen v. Murphy*, a rule for a new trial was obtained, upon the ground, along with others, that the acts of Wall had been improperly received in evidence against the defendants at the trial: nothing further has been done in the case upon either side, and the rule nisi remains now undecided.

The manner in which the Chief Justice affects Mr. Tierney with the knowledge of the proceedings at Mullaghmast is a little singular. His Lordship observes, "He *might* certainly have known them, as "the *fact* was so recent and the *place* so near — "not near where he lives, but near the city of "Dublin, where he was on the Monday following "the meeting*;" so that because he *might* on the

* Charge, p. 147. of the edition published by the Queen's printer.

3d of October have heard of the proceedings which took place upon the 1st of that month, some forty miles off, it is to be inferred that he *also knew the illegal character of those proceedings*, upon which *no imputation had ever been made up to that time upon the part of the Crown*, and that knowing this illegality, which *was unknown to every one else*, he constituted himself a *conspirator by relation*; *deliberately adopting forty monster meetings, not one of which he ever attended*; *besides a conspiracy of which he never heard*; the very date of which—as hypothetical as the existence of it—was afterwards attributed to a period eight months antecedent to the meeting in question. If it be necessary to import the considerations of supposed and comparative proximity of distance and recency of time, for the purpose of bringing home to Mr. Tierney a constructive knowledge, and still more imaginary adoption of the proceedings at Mullaghmast, which was *the last of the forty-one meetings*, upon what principle could he have been holden guilty of *all that had occurred at the forty meetings which preceded the last*? Mr. Tierney was so far from desiring to take a part in any of the great monster meetings, that upon the day when the very meeting of which we are speaking was holden at Mullaghmast, he attended a meeting in his own parish of Clontibret, at which none of the other defendants was present. The Chief Justice, referring to this subject, said, “Mr. Tierney, it seems, on the same day had *a little pet meeting* of his own,” &c. The expression “little

“pet” being obviously intended as a judicial jocular antithesis to “Great Monster!” Such was the tone of dignified impartiality which was exhibited by the Chief Justice, who, in the course of his address to the jury, designated the counsel for the defendants as “the gentlemen *upon the OTHER side!*”^{*} Such was the judge who informed the jury that it was an indictable misdemeanour to endeavour to withdraw the confidence of the public from the established courts of justice in Ireland. After perusing such a charge, one can easily understand how strong must be the temptation to withdraw every degree of confidence from some, at least, of the Queen’s Courts in that country, and how little difficulty there is in effecting such a purpose.[†]

Of the case of the Rev. Mr. Tyrrell it is unnecessary to say much, as death, partly caused by anxiety

* The following is the passage from which the extract is taken:—Addressing the jury, his lordship observes, “I am stating substantially the document to you, and I am speaking under the *correction perfectly of the gentlemen of the OTHER side* to see whether I do *not* state correctly the several documents as I go along; and I shall be very much obliged to them, if they find in any particular I fall short, or mistake, or misstate the documents that occur, to interrupt me. It is quite right they should be aware of that. I shall state no document they have not; and for the ends of justice it is essential that if I misstate at all I should be corrected.”(a) This passage is a very fair sample of the *style* of this extraordinary composition, which we shall more minutely analyse in the course of the present publication.

† The reader is requested to turn from this passage to the affidavit of Mr. Tierney, Appendix, p. 1.

(a) Page 56. of the edition published by the Queen’s printer.

for the result of the prosecution, has released him from this as well as from every other worldly affliction. With reference to the meetings, the overt acts charged against him were, that he attended those of Drogheda and Tara, and "endeavoured" to procure the meeting to be holden at Clontarf, and attended the Association about three times. No complaint is made of his speeches at either of the two monster meetings; and it is not even alleged that he spoke at all at either of them, or upon the few occasions when he attended the Repeal Association. With regard to the projected meeting at Clontarf, against which the proclamation of the Lord Lieutenant was directed, it is generally believed that the fatigue which he underwent upon the night before the day appointed for the meeting in his endeavours to *prevent it, was one of the causes of his death*. The principal evidence alleged in the enumeration of the overt acts, in support of his having conspired on the *13th of February*, was, that he moved certain resolutions at a meeting which took place on the *8th of October*, although he was made responsible for every thing which had been imputed to all the rest of the defendants by the fifty-three pages of overt acts or the bill of particulars.

Upon the same principle, every thing objectionable which was said by Mr. O'Connell at the monster-meetings was charged to the account of Mr. Duffy, who never attended one of them; whilst Mr. O'Connell was made responsible for the writings of Mr.

Duffy, although even the evidence for the prosecution proved*, that Mr. O'Connell had publicly and expressly repudiated any responsibility on his own part or that of the Association for the sentiments expressed in any paper whatever, and especially the "Nation," which is the paper of Mr. Duffy. The only overt acts charged upon Mr. Duffy in respect of the meetings, are the reports contained in his paper of the speeches delivered at the assemblies by Mr. O'Connell. But as Mr. Duffy's paper is a weekly one, it is quite obvious that the speeches reported therein must have appeared in all the daily newspapers of every description throughout the empire, before they could appear in the "Nation;" so that his offence in this respect would universally consist in his having published what had been already made known to the whole world through the medium of previous publications in almost all the other papers in the kingdom.

As it appeared to be a point of primary importance to ascertain, in the first instance, the character and quality of the conduct, which was the subject of the prosecution, we have, in order to place this matter beyond the possibility of doubt, thought it proper to enter, in this place, rather fully into the consideration of some collateral subjects, and also to anticipate, in some degree, the chronological order of the proceedings. The testimony of the Solicitor General to the peaceable and unalarming character and undoubted lawfulness of the meetings in them-

* Flan., p. 193.

selves was borne, after he had heard all the evidence upon the subject, and would, even if it stood alone, and were not, as it was, confirmed by the Attorney General and the whole Court of Queen's Bench, be most abundantly sufficient to put this point beyond the possibility of controversy or doubt.

Such being the character of the meetings, as given by all the authorities, judicial and ministerial, connected with the trial, the prosecutions commenced with the informations laid by Mr. Bond Hughes upon the subject of the assembly at Mul-laghmast, of a meeting of the Repeal Association which took place at the theatre in Abbey Street, and of a dinner which occurred at the Rotunda upon the evening of the same day. Mr. Hughes deposed untruly, through mistake, that Mr. Barrett was present at the theatre and at the Rotunda, and informations for perjury were offered against him before the magistrates. Mr. Hughes, in the meantime, had been convinced of his error, and communicated the fact to the Crown Solicitor, Mr. Kemmis. That gentleman, however, adopted the extraordinary course of abiding by information which the informant himself declared to be untrue. He proceeded with the prosecution against Barrett for conduct of which he knew Barrett to be innocent, and defended Hughes against an imputation of which he knew Hughes to be guilty. It being publicly established beyond controversy by the oaths of several respectable persons that Barrett was not

present at either of the above-mentioned places upon the occasions in question, the untruth of Hughes's deposition upon that point became notorious, whilst none of the general public was aware of the fact that he had privately informed Kemmis of his mistake. Hughes was, in this condition of affairs, perhaps not very unnaturally, hooted in the streets; and the Attorney General, who was acquainted with the whole of the circumstances about Hughes's deposition, made the fact of the popular disapprobation being so expressed against what seemed to be undoubted perjury, a ground upon which he subsequently refused to give a list of the witnesses for the prosecution, alleging that to furnish the list would be to expose the witnesses to public outrage.*

When an application was made to the court for a *mandamus*, commanding the magistrates to receive the informations of Barrett against Hughes, the Attorney General opposed the application, though he knew that Hughes's deposition was untrue; and he at the same time, and whilst the monster indictment was actually pending before the grand jury, proceeded to the outrageous and extravagant indecency of publicly declaring in court, that if the grand jury should find the bill he

* One of the objections which he subsequently made to the plea in abatement was, that it did not state *the names of the witnesses*! which names he himself had prevented the defendants from procuring; and with which, in point of fact, they never had the means of becoming acquainted until after the judgment had been pronounced.

would undertake to establish as foul and wicked a conspiracy as *ever* DISTURBED *an empire!* When the reader considers that this whole prosecution was commenced for the purpose of punishing and repressing the meetings, and that the result of the prosecution, in fact, was to prove that they had never caused, and were never followed, by any *disturbance* whatever, he will be duly sensible of the farcical nature of the exaggerated bombast uttered by the Attorney General upon the occasion to which we refer. The gross impropriety of attempting to influence the grand jury by publicly and previously undertaking to convict the defendants is too obvious to require any particular notice, and is rendered still more glaring by the disgraceful discomfiture by which the whole proceedings of the prosecution were finally overturned. Such an undertaking, given by a public prosecutor in the court where the defendants were to be tried, and *before the very existence of the indictment*, which embodied the accusation, whilst the law, to which the Attorney General, as well as the court itself, owe their very existence, presumed the parties accused to be absolutely innocent of the charge, was, we shall venture to repeat, an indecency as unprecedented as it was outrageous. The absurd inconsistency of this outrage was upon a level with all its other demerits; for whilst the Attorney General was in the act of making a public, solemn, and official declaration, which was obviously and emi-

nently calculated to prejudice the grand jury into the finding of the bill then before them, he opposed the motion of which we have been speaking, upon the ground that it was "calculated to prejudice the case then before the grand jury"!

The indictment, which was presented upon the 3d of November, was returned a true bill upon the 8th. Its dimensions and general character are now matter of universal notoriety. The enumeration of the overt acts annexed to the first count occupied fifty-three printed pages of the largest folio size.* The author of an article in *Blackwood's Magazine* has calculated that the indictment con-

* To which was appended the following "Bill of Particulars," which may serve as a sample of the whole. The reader will not fail to observe, that whereas in all other cases the bill of particulars, as the very name of it indicates, consists of some selected items from the larger multitude of details contained in the indictment itself, the bill upon the present occasion is made up of documents, occurrences, declarations, resolutions, entries, &c. &c. &c., *of which no previous mention had been made in the indictment at all.* This bill of particulars was the Irish answer which the Attorney General gave to the request of the defendants, that he would inform them of the *specific portion* of the overt acts to which he proposed to *limit* the production of evidence at the trial.

BILL OF PARTICULARS.

"In addition to the several matters and things set out in the first count of the indictment, it is intended to give in evidence, in support of the prosecution, the speeches made, the resolutions moved or adopted, the acts done, the letters and other documents read, and the several proceedings which occurred or took place at each and every of the several meetings in the said first count specified or referred to, and any entries of the said several proceedings made by the defendants or any of

tains about 75,000 words! which “monster meeting” of the English language he excuses upon the ground that it was convened “for the *laudable* purpose of giving the parties notice of the *particular* facts from which the Crown intended to deduce the conspiracy, which facts consisted of a “*prodigious* number of writings, speeches, and publications.” But what was it that created the necessity for such a “prodigious particularity?” It was the confessed consciousness of the Crown prosecutors that they were totally unable, upon any principle of the common law, to sustain a direct charge of illegality against any one of the meetings or any one of the defendants, and that they could only accomplish a conviction by tumbling into the jury-box a multitudinous mass of confounding, distracting, and overwhelming details, which would create a general impression in the minds of the jury concerning some general criminality, without

“them, or by the directions of them, or any of them, and *the manner and order in which the persons composing said several meetings respectively went thereto*; and also the speeches made, the resolutions proposed or adopted, the acts done, the letters and other documents read, and the several proceedings which occurred or took place at *each of the several occasions following*, that is to say, at meetings of persons styling themselves the Loyal National Repeal Association, at the Corn Exchange Rooms, on Burgh-quay, in the City of Dublin, which took place respectively on —.” It then sets out the date of *several meetings* which were held in the months of *March, April, July, August, September, October, and November, 1843*, and of the several meetings at *Limerick, Sligo, Charleville, Cashel,*

rendering it necessary to find a verdict upon any issue of any specific nature. These overt acts were charged, some against one, some against two, others against a greater or lesser number of the defendants, and only very few of them were laid as having been jointly committed by them all. But as the gravamen of the indictment was the conspiracy, each individual was, by fiction and relation, made responsible for every thing that was charged as having been either said or done by every other individual in furtherance of the alleged common object, at any place or time; even though the party to be affected by the evidence may not have actually entered into any communication with the persons by whose actions he was affected until long after the acts themselves had been performed; and as the whole of the acts were spread over a period of eight or nine months, and were laid as having occurred in places widely distant from each other,

Ennis, Athlone, SKIBBEREEN, Galway(a), Tullamore, Tuam, Maryborough, Roscommon, and the dinners which took place at those places. “And any entries of the said several proceedings made by the defendants, or any of them, or by the direction of them or any of them, and the manner and order in which the *persons composing the said several meetings* respectively *went thereto*; and also it is further intended to give in evidence, in support of the said prosecution, the holding of, and all proceedings and acts of, certain assemblies styled Courts of Arbitration, held at Blackrock and Rathmines, in the vicinity of Dublin, and also at Limerick, in the months of August, September, and October, 1843, and of the persons professing to act as Arbitrators in the said Courts; and it is

(a) Vide *infra*, page 168. 173.

the consequence must have been interminable anxiety, perplexity, and confusion to the defendants.* For this multitudinous aggregation of charges against nine individuals in a body, the Attorney General was warmly commended by a London organ of the Government as having “mercifully included the materials of a *hundred indictments* in one!” — as if the commonest considerations connected with the administration of criminal justice did not render it obvious that the first and greatest mercy which, consistently with the interests of the public, can be shown to persons charged with a violation of the law, is to make each individual responsible for only his own offences, to give him distinct information of the nature of the imputed offence, and to call upon him to answer as few charges as possible at the same time. This mercy or rather this justice, it is the obvious and bounden

“further intended to give in evidence, in support of the said prosecution, the fact of the printing and publishing, and also the contents, of the several newspapers following.”—It then enumerates the dates of *several* of the *Pilot*, *Freeman's Journal*, and *Nation* newspapers, published during the months of *March, April, May, June, July, August, September, October, and November*, 1843. “And you are to take notice, that *each and every of the said several matters* hereinbefore mentioned or referred to, will be offered in evidence at the trial of this case, in support of *each and every of the counts in the indictment*. Dated 13th of November, 1843.”(a)

* A “notice to produce,” printed with a copy of the Jury Lists in a Parliamentary Return of the 7th June, 1844, consists of *six closely-printed folio pages*. Vide *infra*, p. 174.

(a) Report by Armstrong and Trevor, p. 33*, & 34*.

duty of every public prosecutor, civil or military, to do to every party whom he accuses.* The following report presents a most remarkable confirmation, by the highest authority at present practising at the bar in England, of the correctness of the view which we have taken of this point. The report is extracted from *The Times* of December 23d, 1844:—

“COURT OF QUEEN’S BENCH, GUILDHALL, DEC. 21.

“(Sittings at *Nisi Prius*, before Lord Denman and a Special Jury.)

“The QUEEN *v.* ROWLANDS AND OTHERS.

“Mr. Platt and Mr. M. Chambers appeared in this case for the prosecution. The Solicitor General (with whom were Mr. W. H. Watson, Mr. Humfrey, and Mr. Miller) conducted the defence.

“The indictment was preferred against five persons, of the name of Rowlands, who were charged, together with two others, named Knight and King, with having conspired to procure false evidence to be given in the course of an arbitration, for the purpose of causing the award to be made in favour of the defendant in the action referred, who was also one of the defendants in the present indictment. The subject of inquiry in the action and in the arbitration was, the precise nature of an alleged agreement between the plaintiff and defendant with regard to the purchase of some watches; and it was upon this subject that was committed the alleged perjury, for the alleged procurement of which the present indictment for a conspiracy was preferred. Upon the part of the prosecution, evidence was adduced with a view to show the falsehood of the testimony in question; and the argument on that side of the case was, that as the several acts of the several defendants had a tendency to the attainment of a certain object, namely, the making of the

* See Archbold’s *Crim. Plead.*, edited by Mr. Jervis, Q.C., (1843) pp. 53. 59.; and Hough on *Courts Martial*, p. 40, second edition, by George Long, Esq., Barrister-at-Law.

“award in favour of the defendant Christopher Rowlands, it must
 “be taken that it was for the attainment of that object that they
 “severally swore what was untrue; and that, as they all committed
 “perjury, as the means of attaining a common object, they must
 “be supposed to have conspired together for the attainment of
 “that object by those means. There was no evidence of any
 “previous combination, except that which was said to be afforded
 “by the considerations which we have just mentioned.

“Upon the close of the case for the Crown,

“Lord DENMAN observed, that as the evidence which was
 “now given for the purpose of proving the falsehood of the
 “statements made before the arbitrator existed at the time when
 “those statements were made, *it might have been adduced for*
 “*the purpose of contradicting them before the making of the*
 “*award.* As that course was not adopted, and as the attorney
 “who attended the proceedings before the arbitrator on the other
 “side was not called on to explain why it had not been pur-
 “sued — *as the attention of the witnesses themselves, when exa-*
 “*mined before the arbitrator, did not appear to be called to the*
 “*evidence which was now given to contradict them — and as a*
 “*considerable time had elapsed since the original evidence was*
 “*given,* he (Lord DENMAN) was of opinion that the jury would
 “not, under such circumstances, find the defendants guilty of
 “the charge.

“The jury having signified their assent to his lordship’s view
 “of the case, Mr. Platt, after a few observations, gave up the
 “prosecution, and the jury found a verdict of *Not Guilty*.

“The Solicitor General, after a short interval, rose and re-
 “quested permission of the court to *observe upon the OPPRESSIVE*
 “*NATURE OF THIS PROSECUTION, which, instead of MAKING EACH*
 “*OF THE DEFENDANTS RESPONSIBLE FOR HIS OWN SEPARATE OF-*
 “*FENCE, if he were guilty of any, threw over the whole of them a*
 “*DRAW-NET BY INDICTING THEM ALL FOR A CONSPIRACY, the*
 “*result of which was that the LIPS OF ALL OF THEM WERE CLOSED*
 “*UPON THE PRESENT OCCASION; whereas, if each had been sepa-*
 “*rately accused of the alleged perjury, the other persons who*
 “*were now his co-defendants might be called to show his INNO-*
 “*CENCE of the charge.* He (the Solicitor General) had *felt it*
 “*his duty to express his MOST DECIDED DISAPPROBATION OF SUCH*

"A COURSE, and felt obliged to the court for having permitted him to do so after the close of the proceedings.

"Mr. Platt said, that the reason for including them all in the indictment was, that they had all committed perjury; and as they all committed it for a common object, they were all very properly included in the prosecution. With regard to the course of indicting them for a conspiracy, it had been adopted under the directions of counsel.

"The Solicitor General *shook his head, and intimated otherwise by his gestures his DISAPPROBATION OF SUCH A COURSE; but the conversation proceeded no further.*"

Upon this most important subject the following observations are made in the admirable judgment delivered by Lord Denman in this very case.*

"I am deliberately of opinion that the practice of selecting at the time of trial the counts on which judgment may be lawfully awarded is the right and wholesome practice, producing no inconvenience, and affording a great security for justice. In old times, when the indictment consisted of a single count, it was of necessity the universal practice to form an opinion whether that count was valid: *the constant aim of modern legislation has been to SIMPLIFY CRIMINAL CHARGES; nor is any object more worthy of attention in framing the code of every civilised country.*"

The following are the particulars of the "voluminous, unwieldy, and unintelligible" document upon which Mr. O'Connell and his co-defendants were put upon their trial:—

* Page 30. of the Judgment, in O'Connell v. The Queen, as edited by Mr. Leahy.

It contains eleven counts, in each of which it is charged that the said Daniel O'Connell, John O'Connell, Thomas Steele, Thomas Mathew Ray, Charles Gavan Duffy, John Gray, and Richard Barrett, the Reverend Peter James Tyrrell, and the Reverend Thomas Tierney, unlawfully, maliciously, and seditiously did combine, conspire, confederate, and agree with each other, and with divers other persons, whose names were to the jurors unknown, for the purposes in the said counts respectively stated.

The first count charges the said supposed conspiracy as a conspiracy to do five different acts (that is to say) —

First. “To raise and create discontent and disaffection amongst her Majesty’s subjects, and to excite such subjects to hatred and contempt of the government and constitution of the realm as by law established, and to unlawful and seditious opposition to the said government and constitution.”

Second. “To stir up jealousies, hatred, and ill-will between different classes of her Majesty’s subjects, and especially to promote amongst her Majesty’s subjects in Ireland feelings of ill-will and hostility towards and against her Majesty’s subjects in the other parts of the United Kingdom, and especially in that part of the United Kingdom called England.”

Third. “To excite discontent and disaffection amongst divers of Her Majesty’s subjects serving in Her Majesty’s army.”

Fourth. “To cause and procure, and aid and

“ assist in causing and procuring, divers subjects of
 “ Her Majesty unlawfully, maliciously, and seditiously to meet and assemble together in large
 “ numbers, at various times, and at different places
 “ within Ireland, for the unlawful and seditious purpose of obtaining, by means of the intimidation to
 “ be thereby caused, and by means of the exhibition and demonstration of great physical force at
 “ such assemblies and meetings, changes and alterations in the government, laws, and constitutions
 “ of the realm by law established.”

Fifth. “ To bring into hatred and disrepute the
 “ courts by law established in Ireland for the administration of justice, and to diminish the confidence of Her Majesty’s subjects in Ireland in the
 “ administration of the law therein, with the intent
 “ to induce Her Majesty’s subjects to withdraw the adjudication of their differences with and claims
 “ upon each other from the cognizance of the said
 “ courts by law established, and to submit the same
 “ to the judgment and determination of other tribunals to be constituted and contrived for that
 “ purpose.”

This Count sets out as overt acts of the said supposed designs certain alleged meetings, speeches, and publications.

The second count is the same as the first, omitting overt acts.

The third count is the same as the second, save that in the fourth charge the words “ unlawfully, maliciously, and seditiously ” are omitted.

The fourth is the same as the third, omitting the charge as to the army.

The fifth count contains the first and second charges set forth in the first count, omitting the overt acts.

The sixth count contains the fourth charge set forth in the first count, omitting the words "unlawfully, maliciously, and seditiously," and the "overt acts."

The seventh count is the same as the sixth, adding the words "and especially by the means aforesaid to bring about and accomplish a dissolution of the legislative union now subsisting between Great Britain and Ireland." *

The eighth count contains the fifth charge set forth in the first count, omitting the overt acts.

The ninth count contains the fifth charge set forth in the first count, omitting the intent therein charged, and the overt acts, but adding the following charge (that is to say), "and to assume and usurp the prerogative of the Crown in the establishment of courts for the administration of law."

The tenth count is the same as the eighth, omitting the intent stated in the fifth charge in the first count.

The eleventh count charges the supposed con-

* The judges and law lords in this country unanimously decided that the 6th and 7th counts of the indictment were good for nothing, as they imputed to the defendants nothing which was forbidden by the law. They also decided that the finding upon the 1st, 2nd, 3rd and 4th counts respectively, were so bad as to render each of these counts a mere nullity for the purpose of supporting a judgment.

spiracy to be, to cause and procure meetings in divers places and at divers times in Ireland, “and
 “by means of unlawful, seditious, and inflamma-
 “tory speeches and addresses to be made and de-
 “livered at such meetings, and also by means of
 “the publishing, and causing and procuring to be
 “published, to and amongst Her Majesty’s sub-
 “jects, divers malicious, unlawful, and seditious
 “writings and compositions, to intimidate the Lords
 “Spiritual and Temporal, and the Commons of the
 “Parliament of the United Kingdom, and thereby
 “to effect and bring about changes and alterations
 “in the laws and constitution of the realm as now
 “by law established.”

There are thus in effect six distinct charges comprised in the indictment.

1. A conspiracy to raise and create discontent and disaffection amongst Her Majesty’s subjects, and to excite them to hatred and contempt of, and to unlawful and seditious opposition to, the government and constitution as by law established.

(This charge is set forth in the first, second, third, fourth, and fifth counts respectively.)

2. A conspiracy to stir up jealousies, hatred, and ill-will between different classes of Her Majesty’s subjects, and to promote amongst Her Majesty’s subjects in Ireland feelings of hostility and ill-will towards Her Majesty’s subjects in the other parts of the United Kingdom, especially in England.

(This charge is also set forth in the first, second, third, fourth, and fifth counts respectively.)

3. A conspiracy to excité discontent and disaffection in the army.

(This charge is set forth in the first, second, and third counts respectively.)

4. A conspiracy to assemble meetings of large numbers of persons in Ireland, and, by means of the intimidation to be thereby caused, and the exhibition and demonstration of physical force thereat, to obtain changes and alterations in the government, laws, and constitution, and especially to effect a dissolution of the legislative union between Great Britain and Ireland.

(This charge, with the exception of the last clause, is set forth in the first, second, third, fourth, and sixth counts respectively, and including the last clause is set forth in the seventh count.)

5. A conspiracy to bring into hatred and disrepute the courts by law established for the administration of justice in Ireland, and to diminish the confidence of Her Majesty's subjects in Ireland in the administration of the laws therein, with intent to induce the said subjects to withdraw the adjudication of their differences with and claims upon each other from the cognizance of said courts, and to submit them to the decision of other tribunals to be constituted and contrived for that purpose.

(This charge is set forth in the first, second, third, eighth, and ninth counts respectively, save that in the eighth count the word

“tribunals” is substituted for the word “courts,” and in the ninth count the intent charged is omitted, and there is substituted a charge of conspiracy in these terms, namely, “to assume and usurp the prerogative of the crown in the establishment of courts for the administration of law.”)

6. A conspiracy to assemble meetings of large numbers of persons in Ireland, and, by means of seditious and inflammatory speeches to be made thereat, and also by means of the publication of seditious writings and compositions amongst Her Majesty’s subjects, to intimidate the Lords Spiritual and Temporal and Commons of Parliament, and thereby to bring about changes and alterations in the laws and constitution.

(This charge is set forth in the eleventh count only.)

With regard to the first charge, it is not necessary to say much more than that as the conduct which it describes as the object of the conspiracy is itself a distinct, substantive, and palpable offence against the law of the land—as the offence of sedition is therein implicitly imputed to each of the defendants—the just, equitable, impartial, and unimpassioned administration of justice required that, to use the language of the Solicitor General for *England*, “*each individual should be made responsible for his own separate offence, instead of throwing over them all the net of a conspiracy,*” and proceeding in a manner against the *oppressive*

character of which Sir Frederick Thesiger felt it to be his duty to protest, even in a case in which, if in any case whatever, it would be allowable to infer a previous conspiracy from the separate guilt of the defendants; inasmuch as it is impossible to believe that in the circumstances of that case * all the defendants could have committed perjury upon the same point without having previously conspired for that identical purpose.

The Solicitor General of Ireland, who continually felt the want of candour, equity, and impartiality, which was evident upon the face of the proceedings, made frequent attempts to avert the indignation which all candid persons must have entertained at the course that had been adopted. At the end of his reply he observed, that "*it would not have done*" to convict Mr. Barrett or Mr. Duffy of having published a seditious libel, or Mr. O'Connell of having spoken a seditious speech." But why would it not *have done*? The reason of this very odd statement is even more odd than the statement. "The great question," says the Solicitor General, "which we want to try is the *legality of these proceedings and of this body.*" What proceedings and what body? The monster-meetings and the Repeal Association. If this be so, it must be admitted that the prosecution was a truly Hibernian method of attaining the proposed object of the Crown; as there was, in fact, no *direct issue* upon the trial

* The Queen v. Rowlands, *antè*, p. 40.

as to either the *meetings* or the *Association*. The law officers themselves repeatedly stated this fact, and reminded every body that the indictment was *not* for attending illegal meetings, or belonging to an illegal association, but for *conspiring* to do so and so. Their case upon this point was, that the defendants may be convicted of conspiring to convene the meetings, although the meetings had never been convened at all; and although, when convened, they were perfectly lawful as regarded every one of the hundred thousand persons who attended them except the defendants, by whom they were said to be convened. The result of the trial, as far as regarded this point, was not a little curious. All the counts of the indictment which related to the monster-meetings, except the first and second, charged the defendants with illegally and seditiously conspiring to cause large bodies of persons to meet and assemble for the purpose, &c. The charge in the first and second count was that of illegally and seditiously conspiring to cause large bodies, &c. *illegally and seditiously* to meet and assemble — the character of illegality being in the first and second counts, and in those alone, attributed, though *indirectly, to the meetings themselves*. The jury of course found the defendants guilty upon the first and second, as upon all the other counts; but even *that jury expressly expunged* from those counts, before returning their verdict, the words *unlawfully and seditiously* as applied to *the meetings*, allowing the same words to stand where they affected the

defendants upon the record; so that the effect of the judgment, as entered up on the verdict, as to this point, was, that the defendants were found guilty of *unlawfully convening meetings, which were lawful when convened!*

With regard to ~~the~~ Association, its character was not in any manner whatever in issue.* It is true that the defendants were all members of the body, some of them having been connected with it for three or four years, and one or two for a few days before the commencement of the prosecution. But the defendants, though members of the Association, were not prosecuted *as such*, and their conviction could not in the slightest degree affect the legality of that body. So that if we regard the result of the prosecution we shall have reason to conclude, considering its professed objects, that it was as inefficient as it was absurd; inasmuch as the judges and law lords in England expressly decided that the description of the meetings, as contained in the indictment, was such as not to show that there was any thing illegal, as far as the convening of those meetings was concerned, in the conduct or object of the parties by whom they were convened; whilst we must conclude

* "It was not contended by the Attorney-General that the Association was an illegal body, nor do I pronounce any opinion one way or other upon that subject."—Judgment of Mr. Justice Crampton upon the motion for a new trial. *Morning Chronicle*, 27th May, 1844.

that the Association is a body to which there exists no legal exception, as no attempt has ever been made to convict it of illegality. Indeed, it may be said that the Government did not venture to raise any *direct* or *specific issue* upon the record as to the illegality of any thing except the shadowy and hypothetical subject of an alleged combination among the nine defendants in the indictment.

But *if* the object of the prosecution was to try the legality of the *proceedings*, how does it happen that the indictment was framed in such a manner as that the defendants could be convicted under it without any proof of any *proceedings* at all, either legal or illegal. The law officers of the Crown and the Chief Justice of the Queen's Bench repeatedly informed the jury that, in order to find the defendants guilty of having conspired, it was not necessary to prove that they *had DONE any thing* towards accomplishing the alleged objects of the conspiracy, and that the offence with which they were charged would be complete even though *nothing whatever* should have been *done* in furtherance of the purposes of the combination. But as no direct evidence was or could have been given of any conspiracy, which, on the contrary, was only attempted to be deduced as a consequence from the acts and proceedings of the parties, it follows that, according to the account which the prosecutors give of their own prosecution, it has not only failed as a matter of fact in accomplishing the object for which it was

instituted, but that it was *originally incapable of accomplishing that object.*

The Solicitor General says, "We have not gone "to the inferior agents, or put into prison this "person or that who had acted a subordinate "part." To say nothing of Mr. Tyrrell or Mr. Tierney, what is Mr. Ray, who is a defendant upon the record? The Chief Justice himself states the extent of Mr. Ray's criminality in the following facetious manner*:—"And you have Mr. Ray, "moreover, adding his *mite*." The Chief Justice's jocularly is, however, occasionally of a more sombre character. It having been urged in excuse of Ray for contributing "his *mite*," that he was the mere paid secretary of the Association, the Chief Justice answers the excuse by the following temperate and decorous comparison:—"It might as well "be said that Scotch Andrew could not have been "guilty of the murder of Mr. M'Donnell because "he was in the service of Mr. Fitzgerald, and acted "under his orders; yet Scotch Andrew was *tried*, "*convicted, and executed for the offence.*"

The Solicitor General says, "We have at once "joined issue with Mr. O'Connell." Now that is the very thing which it appears to us to be self-evident that they have *not* done. If the law officers of the Crown *had* pursued this course, their conduct could not, with propriety, be called either unconstitutional or oppressive, whatever objections may be made to it

* Pages 144, 145. of the Queen's printer's edition.

upon other grounds. They repeatedly asserted that such a speech of Mr. O'Connell was a seditious address, and such an article in "The Nation" or "The Pilot" a seditious writing; and the same doctrine was frequently expressed by the Lord Chief Justice of the court. Now, if these statements were correct, any one of those individuals might, according to the just and enlightened principle of Sir Frederick Thesiger, "have been made responsible for his separate offence" by an indictment consisting of one count, which might have been proved by one witness and tried in one day, at an expense of one hundred pounds. This course, however, which the Solicitor General of *England* considered to be the just, candid, and impartial method of proceeding, "*would not do*" for the purpose of the Crown lawyers in Ireland, which was "to bring the leaders into *one mass and one focus* *," and prosecute them in a heap. This metaphor of the "mass" and the "focus," taken from the practical application of a burning-glass, makes an unintended revelation of the real objects of the party who instituted the prosecution in the "converging" form of a charge for conspiracy; as it is well known that the "focus" is the point about which the materials for combustion are collected into a "mass" for the purpose of increasing the power of the machine to which they are exposed, and of more completely effecting their destruc-

* Reply of the Solicitor General, Flan. p 447.

tion.* "This," says the Solicitor General, "is the mode which we *have* BOLDLY and MANFULLY *adopted*." He avers that Mr. Duffy was guilty of writing sedition in "The Nation;" yet instead of making Mr. Duffy separately responsible for that separate offence, the Solicitor General thinks it more *bold* and *manly* to charge him with all that was done at all the meetings which took place from Clontarf to Skibbereen between the 13th of February and the 13th of October, although it is expressly stated by the Chief Justice himself† that Mr. Duffy *did not attend a single one of those meetings*. The law officers of the Crown declare that Mr. O'Connell has made seditious addresses to the people, and *those very addresses* are given in

* This notion of considering defendants before trial as unquestionably guilty—of looking upon them as doomed to destruction, and deserving it—of considering them as animals *feræ naturæ*—and regarding the administration of justice as the mere means of catching and destroying them, is rather familiar with the Tory writers. The author of an article in the last "Quarterly" has the following observation upon this subject:—"In old times criminal justice fished with a *hook*: she is now forced to use a *net*." (a) The writer of an article in the "Blackwood's Magazine" for Nov. 1844, says, "The only consequence was, that the indictment was a little longer than it turns out that it needed to have been. *Though several hooks* had been used in order to give an *additional chance of catching the fish*, that was not regretted, when, *the fish having been caught*, it turned out that two of the three had not been strong enough, and that had they alone been used, *the fish must have escaped*." (b)

† Charge, page 155.

(a) "Quarterly" for Dec. 1844, p. 252.

(b) Blackwood, Nov. 1844, p. 563.

evidence upon the charge of conspiracy; yet the law officers consider it the more *bold and manful course* not to indict Mr. O'Connell separately for his own separate sedition, but to join with him in the same accusation a poor sickly priest, who, before he could be tried for conspiracy to excite seditious resistance to the government, came to his death in consequence partly of his endeavours to induce the people to *obey the government*, and partly from the agony produced by his apprehensions for the result of the prosecution itself, about which he was raving at the very moment of his dissolution. "That," says the Solicitor General, "is the course which we have *boldly and manfully* adopted." Instead of deciding the whole matter in controversy, as we might have done by indicting the principal defendant in one count, which may be tried in a day at a cost of 100*l.*, we have thought it the more bold and manful course to throw a net over the heads of nine persons, and to prefer against them, at an enormous length, an inferential and deductive charge, the real "body and pressure" of which it was impossible to present with any distinctness to the understandings of even the learned,—the proceedings upon which distracted the attention of the empire, and interrupted the regular administration of justice for many months, and put the defendants and the public to an expense of a hundred thousand pounds, one half of which infliction was borne by persons who were ultimately decided to have been

illegally convicted "by a jury, by whom," even according to the judgment of a Tory writer*, "they ought never to have been tried," and upon an indictment of which the following character was given by the illustrious magistrate who occupies the highest position in the administration of the common law and criminal justice in *England*.

"And I must here take the liberty of observing that, in my opinion, there cannot be a much greater grievance or oppression than these endless, voluminous, unintelligible and unwieldy indictments. An indictment which fills fifty-seven close folio pages is an ABUSE TO BE PUT DOWN, not a practice deserving encouragement. Most of the persons who are accused of offences are in a line of life which does not enable them even to get a copy of such a charge from the clerk of assize, who will not part with it without his fees; and when the party accused has obtained a copy, the greatest stretch of mind of the most learned persons can hardly, even for days, AS WE KNOW FROM THE ARGUMENTS AT YOUR LORDSHIPS' BAR, find out what it is

* "And then followed such a series of blunders as could not possibly have occurred in any part of the civilised world except Ireland. God knows, we are not inclined to regard with a partial eye the decisions of Lords Denman, Cottenham, and Campbell in any instance where the interests of their party are concerned. But a regard to truth compels us to acknowledge that their judgment in the case of *O'Connell v. The Queen* was A RIGHT JUDGMENT," and that Mr. O'Connell "was illegally convicted by a jury which never ought to have tried him AT ALL." — *Fraser's Magazine for August*, p. 501.

*“ that is really the matter of criminal charge. It is often ambiguous to that degree, that possibly the pleader who drew the indictment may mean one thing, the judge another, the jury a third ; and the jury, if asked whether the party was guilty in the only sense in which the law would condemn him, might in that sense have acquitted ; whilst a fourth sense may, perhaps, be discovered by the Court of Error for these ambiguous phrases.”**

With regard to the second head of accusation, that of stirring up ill-will between Her Majesty's Irish and English subjects, Mr. Justice Burton seems, in his charge, not to have thought it worth while to advert to it at all, although it is contained in each of the first five counts of the indictment. Indeed, the practice of exciting jealousy and ill-will in the minds of one class against another class of Her Majesty's subjects is an affair of such frequent occurrence, and is carried on so systematically, as to be, as it were, a regular part of the public business of the country. The public newspapers labour, in this respect, with the most indefatigable industry. “The Morning Post” is perpetually invoking the hostility of all other classes of the community against “mortgagees, annuitants, and all the recipients of fixed money revenues.” “The Times” denounces the wrath of earth and heaven

* Judgment of Lord Denman, in the *Queen v. O'Connell*, p. 30, 31.

upon the framers and supporters of the New Poor Law, and imputes the guilt of murder in express terms to those whose position obliges them to attend to the wants of the poor, but whose negligence has allowed them to perish. "The Morning Chronicle," with equal vehemence, denounces the landlords of Ireland as guilty of all the deaths which are the consequence of the horrible system of clearances; and the "Herald" abets the ferocious fanatics who, at Exeter Hall and elsewhere, denounce the whole body of the Roman Catholics of the empire as being unobservant of contracts, incapable of integrity, and essentially idolatrous and rebellious. These journals respectively are supported in different places and in different particulars by several persons who enforce the same doctrines in sermons, and speeches, and compositions, and make them the foundation of their public conduct, religious, political, and personal, — all that is done or spoken by all and every of the parties being calculated, or at least intended, to attain the same common end in each instance, which is, to excite the hostility of one portion of the public against another. Upon the principles, therefore, which were advanced in the recent monster prosecution, it would be perfectly easy to include Mr. Walter, Mr. Oastler, Mr. Ferrand, Mr. Bowen, and the editor of "The Times" in one indictment, and Sir John Easthope, the editor of "The Morning Chronicle,"

and a few of their Irish correspondents and co-operators in another. Nothing could be more easy than to prove that these parties respectively had acted in the manner described in one part of the monster indictment, and that they had in their several ways co-operated to excite hostility in one class against another. Mr. Miles, the Duke of Richmond, Lord Egmont, and other Protectionists, may be united with a couple of brace of London editors, in a charge of exciting ill-will in all the rest of the public against the whole body of the Free Traders; who themselves not being at all behind their antagonists in the amabæan contention of abuse are in the habit of denouncing landlords, monopolists, and indeed the whole aristocracy at large, as a class which exercises all its power to the detriment of the rest of the community, and whom therefore it is a duty to devote to at least a *political* extinction. For this offence they may be represented by Mr. Villiers, Mr. Cobden, Mr. Pattison, Mr. Bright, and as many supernumeraries as would be sufficient to make a respectable muster of defendants. Mr. Jones Loyd might of course be easily included in the indictment, and would have the pleasure to be informed, with “prodigious particularity,” of all the “speeches and writings” which had been delivered by any Free Trade orator since the date of the conspiracy, whenever that may be assigned, either in Covent Garden Theatre or at any of the hundreds of meetings attended by hun-

dreds of thousands of individuals which may have occurred at Stockport, Manchester, Liverpool, or any other of the fifty places where such overt acts have been committed. He would receive a notice in the Bill of Particulars that, besides all the "pro-digious particularity" of the indictment itself, evidence would be given against him of all that had been done at a score of other meetings of which he never heard, as well as of the order in which the persons who attended those meetings proceeded thereto, and of any particular conversation which may have occurred between any two of the said persons by the way, and he would, finally, receive a notice to produce all the books, papers, entries, &c. &c. of all the direct and collateral branches of the Anti-Corn-Law League, as well as of the central society itself. Of Mr. Loyd's liability there can be no doubt, according to the Irish doctrines upon that subject. Like Father Tierney he deliberately adopted the League, as it stood with *all its criminality, if any existed at the time*, and like Father Tyrrell he did an act very disagreeable to the Government at a particular juncture; and as Mr. Tyrrell was included in the prosecution for moving certain resolutions immediately after the proclamation of Lord De Grey, Mr. Loyd may be included for sending in his adhesion and his 50*l.* to the League on the eve of the election of Lord John Russell. It is, however, some consolation to the parties just mentioned, that, if we are to form an opinion from

the apology which the Solicitor General of Ireland has made for delaying the prosecution of "Daniel O'Connell and Others," we must infer that the Government of this country is not yet in a condition to establish the charge of conspiracy against the League, not having hitherto received such evidence of their "criminality" as would be sufficient to "coerce" a jury into a verdict of guilty. We may add, though not for the purpose of exciting alarm, that a Government paper hinted to the League on the 18th of January, 1845, that the Attorney General may some day or other prosecute that body. Independently, however, of the gratitude which Sir Robert Peel must entertain towards Mr. Cobden and certain other members of the League for important services rendered at a very critical conjuncture, the Right Hon. Bart. is well aware that he may, without exciting any indignation in England, prosecute conduct in Ireland such as he would not even dare to entertain the notion of making the subject of a prosecution in England itself.

The manner in which the learned judge, who addressed the grand jury, expressed himself upon the charge of exciting disaffection in the army sufficiently shows the flimsy and evanescent ground upon which that charge was advanced. "The principal evidence," says his Lordship, "in support of this charge, so far at least as it has fallen under my observation, is to be found in what im-

" ports to be a *letter* or letters, published in a news-
 " paper, or perhaps in several newspapers, of which
 " *some one* of the parties accused *are* or *is* the
 " editors or editor. These documents, or *whatever*
 " *documents there may be of this description*, should
 " be considered with care, with the view on the one
 " hand to elicit the true meaning and intention of
 " the composition itself, for it may well be supposed
 " that a design of such a description would be con-
 " veyed in *ambiguous* and in very *careful* and *studied*
 " *language*; secondly, to the fact of its being pub-
 " lished with or without the *knowledge of that*
 " *meaning* by the party publishing; and, lastly,
 " whether the publication bearing that guilty mean-
 " ing was or was not in accordance with the inten-
 " tions of the parties accused, *or any of them.*"

This doctrine exhibits in the clearest light the
 manner in which a parcel of nonentities may be
 converted into criminal conduct if they can once
 be presented upon the framework of an inferential
 conspiracy. If any one of the defendants should
 happen to understand a letter, even though it be
 expressed in *careful, studied, and ambiguous*
language, and to perceive in it a guilty meaning
 which the author, if he had such meaning at all,
 had studiously rendered ambiguous; and if after
 having so penetrated to the guilty meaning of
 the document he finds it to be in accordance
 with his own intentions, and gives it publica-
 tion, it may, it seems, be *inferred* that *every*

other one of the defendants has not only assented to the publication, but that he attaches to it the same meaning attached by the publisher, and this although he may have been altogether unable to see the meaning in question or may consider the meaning to be perfectly innocent, or though he may not understand the meaning, or even though he may never *have heard of the document at all*, and though it may have been published before he became acquainted with the writer, and even though he may never have become acquainted with the writer, or known who he was. The Solicitor General in his reply admits expressly that Mr. O'Connell, who was found guilty of this charge, always advised his associates not to enter into any correspondence with any body in the army — that being a dangerous proceeding, and in some circumstances an offence against the law. It may not be improper to insert here the most remarkable portion of the letter to which Mr. Justice Burton alluded. It professed to be written by the Rev. Mr. Power, P. P. of Kilrossenty, and was published in the Pilot, which is the newspaper of Barrett:—

“ There is one class of persons whom Mr. O'Connell has not taken into his school in his lectures upon political rights and duties, but who have, it seems, profited, notwithstanding, to some extent by his peaceful doctrines,— I mean the military. Mr. O'Connell is the best abused man in the

“ world ; his motives are misconstrued, his objects
 “ misrepresented, his character maligned, his per-
 “ son insulted, and his character held up to scorn ;
 “ his course must be cautious. If he touched upon
 “ this subject, he would be cried up at once as an
 “ open rebel. It would be said that he wanted to
 “ corrupt the soldiery, and withdraw them from
 “ their duty. It would be put down as an act of
 “ high treason. It was, therefore, consummate
 “ wisdom on his part never even to have alluded to
 “ it. His system cannot be perfect, however, — it
 “ will not embrace every class, through whose
 “ agency an oppressed and plundered people can
 “ create for themselves a wise, just, and impartial
 “ government, without bloodshed, rapine, or any
 “ species of crime, unless the soldiery are in-
 “ structed in their conscientious duties. *The very*
 “ *life and soul of a soldier's profession is to die for*
 “ *his duty* : let the brave soldier therefore know his
 “ duty, and he will die to perform it ; but as he
 “ every day of his life dares death, he will die
 “ before he would exceed it. My present purpose
 “ is to explain as clearly as I can what that duty is.
 “ I cannot be suspected of corrupting the soldiery,
 “ or bringing them over to second any views of my
 “ own. I can have no political object, no ambi-
 “ tious projects. I took the oath of allegiance, and
 “ I shall adhere to it to my death, and my position
 “ in society is immoveably fixed. I can, therefore,
 “ have no other object but to state the truth ; and,

“ as truth and justice must ever go hand in hand,
 “ to make the statement of the true doctrine on
 “ this point subservient to universal justice as far
 “ as it may. I do not presume to be an authority
 “ on this most grave and important subject, but,
 “ stating thus publicly what I conceive to be the
 “ true doctrine regarding it, I am open to correc-
 “ tion. I call upon my fellow-clergymen, whose
 “ duty it is to be accurately informed on it, and to
 “ communicate that information to all whom it
 “ may concern, to set me and the public right when
 “ I may have erred. I am sure many of them will
 “ be found to do so if I go wrong. A soldier is a
 “ person who hires himself to a government for the
 “ purpose of slaying his fellow-men. He does not
 “ carry destructive weapons for the purpose of
 “ hunting down wild beasts, or butchering sheep or
 “ oxen. No; expressly and distinctly it is to kill his
 “ own fellow-creatures. Viewed solely in this light,
 “ every feeling of our nature recoils with horror
 “ from the profession of a soldier; and yet the true
 “ soldier is a manly, generous, and noble fellow.
 “ *His duty and his object, it is true, is to slay his*
 “ *fellow-man; but then he is no cut-throat or hang-*
 “ *man. He would sooner be the victim of either than*
 “ *stain his high character with the crime of the one or*
 “ *the infamy of the other. He is not the ready tool of*
 “ *a bloody-minded tyrant, who would employ him to*
 “ *cut down the unarmed and defenceless. He would*
 “ *sooner stand to be shot at than be converted into a*
 “ *murdering man-butcher by any such horrible mis-*

“ *creant*. It has been reported of a certain officer
 “ now stationed in Ireland, that he attended an
 “ assemblage of magistrates held on the eve of one
 “ of Mr. O’Connell’s great monster-meetings, as
 “ they are called, and that he offered on just get-
 “ ting a hint, to drive a troop of dragoons into the
 “ body of the meeting, and trample and cut down
 “ like weeds men, women, and children! If it be
 “ a fact that this *red-coated fiend* made such an
 “ offer, and that it is known to his fellow-officers in
 “ the service, and that they now associate with
 “ him, I call them *to their teeth a pack of*
 “ *cowardly, infamous, unmanly scoundrels*. He is
 “ no soldier. He is not only a disgrace to the cha-
 “ racter of an officer, but he would be a disgrace to
 “ a gang of pirates. No brave man ever made
 “ such an offer. A brave man would let himself
 “ be blown from a cannon before he would even
 “ contemplate it; and the officers who tolerate such
 “ a filthy cannibal amongst them deserve to be sent
 “ out to gloat themselves upon human flesh in the
 “ congenial companionship of their fellow-savages in
 “ the South Sea Islands. Having said thus much
 “ upon what *is not*, I now come to state what *is* the
 “ duty of a soldier. It is his duty to *fight* against
 “ the *enemies of his country*, armed for attack, or
 “ armed and forewarned for defence. This is the
 “ sum and substance of his duty: if he is ever
 “ employed for any other purpose he is not bound
 “ to obey; but *to this duty he is bound to devote*

*“ every energy of his mind and body in life and
 “ death. In action the soldier is to have no will
 “ of his own. It is the right and duty of his
 “ commanding officer to point out what he is to
 “ do. It is his duty to do it or die, not only as a
 “ matter of personal bravery, but as a conscientious
 “ duty before God, he is bound to give up all
 “ thought of self-preservation, all feelings of huma-
 “ nity towards the enemy, not, however, to the
 “ extent of unnecessary cruelty, to weaken and
 “ destroy the adversary in every way in his power,
 “ and even when he sees that his own death is
 “ inevitable, to sell his life as dear as he can. War
 “ being once legitimately proclaimed, the soldier is
 “ a mere instrument in the hands of the govern-
 “ ment of his country, to be employed by the
 “ general placed over him for the destruction of
 “ the enemy; and whatever intellect he possesses
 “ he is only to use to carry into effect the com-
 “ mands of those in authority over him. It will
 “ be said that this is a degrading and debasing
 “ condition to place rational beings in who are all-
 “ accountable for their actions, and many of whom
 “ may be as intelligent and enlightened as the
 “ very general whom they are thus blindly re-
 “ quired to obey; but the strength and effective-
 “ ness of an army is ever in proportion to the
 “ extent to which this spirit pervades the whole
 “ mass, men and officers. Prompt, cheerful, and
 “ determined resolution to carry the commanding
 “ officer’s orders into effect is the whole secret of*

" military discipline. On it alone depends victory :
 " it will tell almost against any odds, and it is
 " therefore that it is a moral duty in a just cause.
 " This is the full extent to which the unreflecting,
 " mechanical obedience required from the soldiery
 " can be carried. *It is absolutely impossible that*
 " *any human authority could exist on earth which*
 " *could absolve any man in any condition or pro-*
 " *fession from the moral responsibility which attaches*
 " *to every rational being.* The soldier, like every
 " other man who hires himself for any particular
 " business, if required to go beyond it, is not
 " bound to obey ; *if it ceases to be legitimate, he is*
 " *bound not to obey.* The soldier is bound to fight
 " against the enemies of his country a just war.
 " This is his sole duty—this is his only obligation ;
 " if commanded to do *anything else, he is not bound*
 " *to obey :* and if he did obey with arms in his
 " hands, when required to do anything unbecoming
 " a soldier, I would call him not only a base slave,
 " but an arrant coward. *If the government to*
 " *which he has engaged his services as a soldier*
 " *should be so iniquitous as to enter upon a war of*
 " *plunder or unjust oppression against an unoffending*
 " *people, he should die before he would participate in*
 " *such a horrible crime.* No supposed obligation, no
 " imaginary duty, would justify or excuse him before
 " God and the world ; he would be a robber and a
 " murderer if he advanced one step in obedience to
 " any human being for such a wicked purpose."

In conjunction with the letter of Mr. Power there was read from an article called the "Morality of War," which appeared in Duffy's paper, the following extract : — " If a man fight in the ranks of *an invader or a tyrant* — if he fight against *the cause of Liberty* and the land that gave him birth — " may his banner be trampled, and his sword broke " in disastrous battle, and may his name rot in " infamy ! But if he fight for *truth, country, and freedom*, may fortune smile upon his arms, and " victory charge by his side ! "

We shall not pretend to enter into any consideration of the merits or demerits of these compositions. We have, however, no hesitation in affirming that the doctrines which they lay down upon the subject of a soldier's duty are so far from being either new or unusual, that *they are the principles which have been systematically propounded and enforced by all the eminent writers who have ever treated upon ethical subjects*. As this fact appears to us to be quite notorious to all persons who are even moderately acquainted with the literature of ethics, it may appear superfluous to advance any authority upon the point. We shall, however, trouble the reader with a few extracts upon the question from writers of established reputation.

In treating of the duties of a Christian soldier, Grotius mentions, with high commendation, the conduct of those who served under the Emperor Julian, " and who marched with alacrity to the

“field in defence of the state, but *when he commanded them to draw upon the Christians they refused to obey, assigning the SUPERIOR COMMANDS of the EMPEROR OF HEAVEN.*” He then extols, with similar commendation, the conduct of the Theban Legion, who allowed themselves to be decimated rather than obey commands which they had received from the Emperor Domitian, and which they thought it their duty as Christians to resist. He concludes by citing their address to the Emperor upon another occasion, as expressing, with substance and brevity, the whole duty of a Christian soldier in similar circumstances : — “*Quæ Christiani militis officium solida brevitæ exprimit.*

“*Offerimus nostras in quemlibet hostem manus quas sanguine innocentium cruentare nefas ducimus. Dexteræ ipsæ pugnare adversus impios et inimicos sciunt, laniare pios et CIVES nesciunt meminimus nos PRO CIVIBUS potius quam ADVERSUS CIVES arma sumpsisse. Pugnavimus semper pro justitiâ, pro pietate, pro innocentium salute*,*” &c.

The following passages are taken from “The Duties of Men,” by Gisborne, who cites the authority of Blackstone in support of the principles laid down by Gisborne himself.†

“It has been already observed that the obedience which is the duty of an officer is prompt and punctual obedience to *lawful* authority. This

* Grot. de Ju. B. & P., lib. i. cap. 2. sect. 10. N. 12.

† Vol. i. p. 273—277.

“ statement implies that the thing commanded *must*
 “ *be* **LAWFUL**, for *otherwise* the authority which
 “ *presumes* to enforce it is *so far unlawful*. Were
 “ an officer, then, directed by his superiors to do
 “ what is contrary to the received laws of war and
 “ of nations, *to the laws of his country*, or to the
 “ laws of God, *his COMPLIANCE with the order would*
 “ *be* **CRIMINAL**.”

“ Let him remember that *no human authority*
 “ can change the eternal distinction between right
 “ and wrong, or be pleaded in excuse by any man
 “ for doing *what his conscience deliberately disap-*
 “ *proves*. If he is ordered to co-operate in any
 “ *unjustifiable* undertaking, let him, *at all hazards*,
 “ **REFUSE to comply**. And if not only the loss of pro-
 “ fessional honours and emoluments, but *severe*
 “ *punishment, and EVEN DEATH ITSELF should stare*
 “ *him in the face in consequence of his refusal*, let him
 “ remember the *unequivocal* directions which his
 “ Saviour and *final* Judge has already addressed to
 “ *all* who are reduced to the alternative of offend-
 “ ing either God or man: ‘Fear not them which
 “ ‘ kill the body, and after that have no more that
 “ ‘ they can do; but fear Him who, after he hath
 “ ‘ killed, hath power to cast into hell: yea, I say
 “ ‘ unto you, fear Him.’ ” *

“ From these considerations it follows that every
 “ individual officer who is called into active ser-
 “ vice is **BOUND to investigate the justice of the war in**

* Luke xii. 4, 5.

"which he engages. If he should be thoroughly convinced that his own country is the aggressor in the quarrel, or deems the probability to be very greatly upon that side, it is his INDISPENSABLE DUTY TO RESIGN, whatever FALSE HONOUR or personal or interested motives may suggest to the contrary."

"Will it be said that it is his part to obey and leave the state to answer for the guilt? This is not the argument of a considerate man, or of a Protestant. The state, on whatever principles it may claim his obedience, cannot exempt him from that which he owes to his God; and should the naval or military officer decline, on the plea of conscience, to undertake the service enjoined, there seem to be *no grounds*, if the sincerity of his plea can be ascertained, *in which his discharge can be refused; nor any, if it should be refused, on which his compliance can be justified.*"

"Murder," says Sir William Blackstone*, "is expressly forbidden by the Divine and demonstrably by the natural law; and *if ANY human law* should allow or enjoin us to commit it, *we are BOUND TO TRANSGRESS that human law, or else we must offend both the natural and divine.*"

In support of these principles authority may be derived even from military works of a merely professional character. A reference has been already made to Major James, the editor of Lord Woodhouselee's "Treatise upon Military Law," and

* Com. Introd. page 42-3.

himself the author of the "Treatise upon Courts Martial" and the "Military Dictionary." The "Treatise on Courts Martial" is *dedicated to the Duke of York*, and the dedication expressly reminds his Royal Highness that the work of Lord Woodhouselee above mentioned was dedicated to the Prince Regent. The writer goes on to appeal to the Duke himself in support of the position, that the "*army are by no means the passive instruments of Power.*" In the "Military Dictionary" the author declares the proper obedience of a soldier to consist in a prompt submission to "*lawful commands,*"—the very terms in which Gisborne has laid down the doctrine upon the same subject. In addition to the authorities already adduced upon this question, it may be mentioned that a learned member of the bar, who authorises the statement of the fact, has informed the writer that he has seen, in Lord Brougham's handwriting, an opinion in which that noble and learned lord has declared that if a soldier should be called to account at law for a trespass committed in this country upon one of his fellow-citizens, *it will not be a sufficient legal excuse to allege that in the matter complained of he acted UNDER THE COMMAND OF HIS SUPERIOR OFFICER, without going on to allege, what must also be proved, that the matter so commanded was LAWFUL in itself.*

The following cases upon the point have been decided by the tribunals of this country:—

"If a superior officer imprison an inferior

"officer for disobedience to orders, made *under colour, but not within the scope* of his military authority, he is liable to an action of trespass at the suit of such inferior officer, and this although the imprisonment be followed by a trial by *court-martial*."—(Warden v. Bailey, 4 Taunt. 67.)

"If an officer, in imprisoning a soldier, *acts under the orders of his commanding officer*, he can justify the imprisonment, *if it were justifiable on the part of the commanding officer*."—(Bailey v. Warden, 4 M. & S. 400.)

"The lieutenant of a press-gang, *to whom the execution of a warrant was properly deputed*, remained in King-road, in the port of Bristol, while his boat's crew went some leagues down the channel, *by his direction*, to press seamen. It was held that this impressment was *illegal*, and that one of the press-gang being killed in the *furtherance of that service* by a mariner, it was ruled to be only *manslaughter*, though no personal violence had been offered by the *press-gang*."—(Broadfoot's Case, Foster, 154.)

"A *press-warrant* had been directed to Lieutenant W. Palmer, *enjoining all mayors, &c., to assist him, and those employed by him*, in the execution thereof. Palmer gave *verbal orders* to the prisoners to impress certain sea-faring men, but the delegation was held to be *clearly bad*, and the execution of the warrant by the

“prisoners to be *illegal, although it was proved to be the constant custom of the navy to delete the authority in that manner.*” — (Brothwick’s Case, 1 Dougl., 267.)

“A sailor in the King’s navy, *on duty as a sentinel, has no authority to fire upon persons approaching the ship against orders.* The prisoner was sentinel on board the *Achille* when she was paying off. The orders to him from the preceding sentinel were *to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach,* and he received a musket, three blank cartridges, and three balls. Some boats passing forwards, he called upon them *repeatedly to stop,* but one of them persisted, *and came close under the ship.* He then fired at a man who was in the boat, and killed him. It was put to the jury *whether he did not fire under the mistaken impression that it was his duty,* and they found *that he did.* But, on a case reserved, the judges resolved *unanimously* that it was nevertheless *murder.*” — (Thomas’s Case, 1 Russell, 509.)

“The book called ‘Rules and Regulations for the Government of the Army,’ said Lord Tenterden, is not a book of which *we* can take judicial cognizance.” — (Bradley v. Arthur, 4 Barn. Cress. 304.)

If Mr. Power of Kilrossenty, instead of undertaking to communicate his own sentiments to the public upon this point in his own name, had contented himself with transmitting to the editor of *The Pilot* for publication the extracts which we have above given from the great authorities to whom we have referred; and if the newspaper had been admitted in evidence against Mr. Barrett and the other defendants in support of that part of the indictment which charged them with conspiring to excite disaffection in the army, it is impossible to believe that even a jury which was acknowledged by the prosecutor upon the record to have been fraudulently and illegally compacted for the conviction of the defendants would convict them of such a charge upon such evidence.

The ground upon which the Solicitor General* declares the passages in the "Pilot" and the "Nation" to be illegal is, that if the soldiers were to adopt the doctrines therein promulgated, the soldiers would ask, "Is this a just war?" Now that is the very question which, as we have shown, the scientific and systematic writers upon morality agree in declaring that it is the duty of the soldier to ask, and for the consequences of neglecting which the law writers make him responsible. We have already observed that we do not profess to

* Flanedy, p. 434.

enter into any consideration of the abstract merits of the doctrine upon either side : —

Non nostrum tantas componere lites :

but supposing the authorities which we have adduced to be correct expositions of the principles which they profess to lay down, we ask how it is possible that any man can contend that it is not the duty of a soldier to make the inquiry which religion and morality command him to make? And if it be his duty to make the enquiry, we ask how it can be an indictable offence to recommend the performance of his duty ?

Some further evidence affecting Mr. Barrett arose out of the following facts : —

A private soldier having sometime about the beginning of September dropped dead on parade from over-drilling, and another having in a fit of desperation advanced from the line and shot the adjutant, an article appeared upon the subject in the *Dublin Pilot* of the 6th of September, and this article was given in evidence for the prosecution. It began with stating, that if the Press had not at length interfered there would have been *no bounds to the persecution of the private soldier*; and afterwards alleged that promotion to commissions was only for the rich, whilst to the soldiery were left *the mangling lash to the bleeding back*, and such *merciless drilling* as had caused poor private M'Manus to fall down dead, and George Jubee, a

soldier of acknowledged good character, to send in desperation a bullet through the body of his adjutant. Such was the manner in which this transaction was treated in the *Irish Pilot*. The following is an extract from an article upon a similar instance of the same general subject, taken from a recent number of *The Scotsman* : —

“ We have found the harrowing details given below in the *London Medical Gazette*. They will be read, we think, with deep interest, and our readers, we feel sure, will agree with us, that they betray a degree of *cruelty* and *tyranny* in the *treatment of our soldiers disgraceful* to the GOVERNMENT which authorises it. We are well aware of the necessity of maintaining discipline in an army with a strong hand; but the system must be wrong under which such acts as those described below take place. It will be observed that in the cases narrated the men *so cruelly punished* were generally of *good character*, while their *offences* were *trifling*, or were charged on mere suspicion, or were *provoked by tyrannical usage on the part of the officers*. Had Flanagan and Darby Star been *taken by a piratical cruiser, and sold in Algiers for slaves, they could not have been more barbarously used*, and in one respect their lot would have been better, for their energetic characters would in all probability have opened the paths of promotion to them. And *this is the condition in which 90,000 British sub-*

“jects are doomed to spend their lives ! It is absurd
 “to speak of the ‘severe laws’ of the army. So
 “far as the privates are concerned, NO LAW EXISTS
 “but the DISCRETION of the commanding officer.”

“DESPERATION seems to be the PARENT of many of
 “those acts of insubordination which expose soldiers
 “to the lash and to the penalty of death, and this
 “desperation is apparently induced by the SEVERE
 “RESTRAINTS to which they are subjected, joined with
 “the PAINFUL CONVICTION that their state is unchange-
 “able, and that their sufferings can only end with
 “THEIR LIVES. We have fearful evidence of this in
 “the fact that one death out of every twenty in the
 “cavalry regiments is from suicide.”

The writer in the *Scotsman* then proceeds to give at great length all the particulars of the horrible cases to which a reference is made in the preceding passage; but for our present purpose it is unnecessary to trouble the reader with any further details.

The following passage is extracted from a leading article of the London *Morning Chronicle* of the 14th of January instant:—

“We call the attention of our readers to a com-
 “munication of a most painful nature, which
 “appears in another column, signed ‘Justice to
 “India.’ If the statements in that letter be cor-
 “rect, and they are supported in almost every
 “particular by the printed papers and documents
 “having reference to the case which have come to
 “our hand, we have little hesitation in saying that

“not only has ‘justice’ not been done to certain
 “of our Indian subjects in this case, but that the
 “most rigorous penalties of martial law have been
 “inflicted upon soldiers in the Madras Sixth Light
 “Cavalry, by a process illegal in itself, according
 “to the articles of war and the precedents which
 “have been established in regard to them by the
 “very highest authorities.

“This is a startling position to take — our
 “readers will presently see whether we are able to
 “establish it; but, if we do, we tell them plainly
 “that *the necessary consequence will be, that two*
 “*troopers of the said Madras Sixth Light Cavalry*
 “*have been MURDERED (besides that FIFTEEN others*
 “*have suffered the severest penalties short of death),*
 “under semblance of judicial proceeding; and that
 “*men HIGHEST IN AUTHORITY in the GOVERNMENT of*
 “*the Madras PRESIDENCY must be held responsible*
 “*for that MURDER.*”

In a subsequent part of the same article the writer has the following passage: —

“Here apparently is a closing of the whole
 “matter — congratulation at the termination of
 “an unseemly state of things, coupled with a re-
 “primand and a punishment, namely, the removal
 “to Arcot. Such, however, was not, as it appeared
 “to be, the case; and here we have *to charge THE*
 “*MARQUIS OF TWEEDDALE with PREMEDITATING A*
 “*MOST UNMANLY AND UN-ENGLISH act of FRAUD.* His
 “Lordship, in the above official communication,

“ assigns certain reasons for removing the Sixth
 “ Light Cavalry to Arcot; but in a manifesto
 “ which he has lately thought it necessary to pub-
 “ lish *he does not blush to state that the reason so*
 “ *assigned was NOT the TRUE one* — that there was
 “ another motive behind, which he *designedly with-*
 “ *held*. In the fifteenth paragraph of this *singularly*
 “ *disgraceful document*, the noble Marquis, after
 “ detailing the views of vengeance which he enter-
 “ tained, and the means by which he hoped to
 “ enmesh his victims, says,—

“ ‘ *To carry this purpose into full effect, I at once*
 “ ‘ *determined upon ordering the regiment to Arcot,*
 “ ‘ *where this important inquiry could alone be made*
 “ ‘ UNDER MY OWN IMMEDIATE DIRECTION.’ ”

These extracts from two metropolitan journals of England and Scotland afford a sample of the manner in which subjects of that nature may be treated with impunity in Great Britain, whilst language of vastly less intensity and severity is the subject of prosecution in Ireland. It may be further observed that the speeches and articles of Mr. O’Connell and others of the defendants upon this subject contained several examples of such expressions as “ ruffian soldiers,” “ military fiends,” “ cowardly scoundrels,” and other such designations, as would certainly appear to be very little calculated to entice the members of the British army from the performance of their duty. Upon such evidence, however, Daniel O’Connell, Barrett, and Duffy, were found guilty,—there not being a

particle of evidence to show that *even an attempt* had been made to bring any of the articles in question to the notice of any soldier ; and even the Chief Justice himself expressly declaring * that the design, even if formed, “ was never, in fact, carried into execution.” Nobody can believe that any Attorney-General would venture to prefer a separate indictment for such an offence upon such evidence. Mixed up as it was, however, in the present case, with such a monstrous mass of other imputations, it received assistance from the other collateral charges ; and, like every other separate portion of this vast and heterogeneous indictment, it received some additional force from the monstrous heap of particulars by which it was surrounded in the “ voluminous, “ unwieldy, and unintelligible ” document of which it formed a part.

Let us now proceed to that part of the charge which relates to the monster meetings ; in reference to which it will be recollected that the judges in this country are unanimously of opinion, that the sixth and seventh counts of the indictment are bad. Such is also the opinion of the House of Lords ; and, indeed, the whole of the judgments upon both sides proceeded upon the ground, that the counts in question disclosed no offence against the law. The counts which have been so declared to be invalid and illegal by the judges and the lords,

* Page 178. of the Charge as printed by the Queen's Printer.

are directed against the monster meetings, and contain not any portion whatever of the several other charges which are contained in the remaining counts of the indictment. It was for the purpose of putting down those meetings, by procuring a declaration of their illegality, and punishing the persons who convened them, that the whole prosecution was commenced. But the English judges have unanimously declared their opinions, and the House of Lords have, with the exception, perhaps, of Lord Brougham, declared their judgments to be, *that those meetings, as they are described in the sixth and seventh counts of the indictment, are not illegal at all.**

The form of the charge in the sixth and seventh counts is, that the defendants maliciously, &c. conspired to cause large numbers to meet for the purpose of obtaining changes in the laws and constitution, &c., and especially the Repeal of the Union, through the intimidation to be caused by means of the exhibition and demonstration of great physical force at the meetings themselves. The decision, therefore, of the judges and of the lords is,

* It may be desirable to insert in this place the statement of the Lord Chancellor upon this point, which we cite from the corrected copy of his judgment, which has been printed only within the last few days. "Two of the counts," says his Lordship, "are defective, in the opinion of the learned judges, *because they contain NO CHARGE of any offence.* There are various allegations in those counts; *but they do NOT constitute ANY OFFENCE known to the law.*"(a)

(a) Judgment, p. 3.

that a general charge of causing great numbers to assemble, for the purpose of procuring changes in the constitution and in the laws by intimidation, to be effected by the exhibition of great physical force, does not constitute a charge for which any man can be put upon his trial, according to the law of England. As the language of the judges upon this point is extremely important in a general view, as well as with respect to this particular case, we insert the very words which were used by Lord Chief Justice Tindal in delivering the unanimous opinions of the judges upon the point.

“ The word intimidation is not a technical word; it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use, employed on this occasion *in its popular sense*; and in order to give it *any force*, it ought at least to appear from the context, *what species of fear* was intended, or *upon whom* such fear was intended to operate.

“ But these counts contain *no intimation what- ever upon what persons* this intimidation is intended to operate; it is left *in complete uncertainty*, whether the intimidation were directed against the peaceable inhabitants of *the surrounding places*, against the subjects dwelling *in Ireland in general*, against persons *in exercise of public authority* there, or even *against the legislature of the realm*.

“ Again, the mere allegation that these changes

“ were to be obtained by the exhibition and demonstration of physical force, *without any allegation* that such force *was to be used*, or *threatened to be used*, seems to us to mean no more than the mere *display of numbers*, and consequently to carry the matter no further.”

In reference to the opinions thus delivered by the English judges upon this subject, it may be observed that the intimidation laid *in the indictment* was an intimidation *in the abstract*, without any express, or even any implied application to any individual, or any body of individuals in the community. It was, however, by the Court and the prosecutors, according to their own caprice, or convenience, or conjecture, orally treated throughout the trial as an attempt to intimidate any body, or some body, or every body — “ the people of England ! ” * “ the legislature,” “ the councils of the nation,” “ the ministers,” “ the persons holding office under the government,” “ the persons having the management of state affairs,” the inhabitants of each particular locality, or only such portion of them as were, or were imagined to be, unfavourable to the defendants themselves, or to the changes which they proposed, or the time or manner in which they were to be effected or attempted, or intended to be effected, or intended to be attempted to be effected. The use or projected use, or future possible use, of such intimidation, so left *at large upon the record*, without

* Reply of the Solicitor General, Flan., 419.

specification or distinction, and without any application to any individual, or collection or class of individuals, was expanded by the Court of Queen's Bench in Dublin to the dimensions of an indictable misdemeanor, by the convenient process of supplying in conversation, and without the shadow of any justification from the evidence, every necessary fact of which the allegation was wanting upon the record!

The whole body of the English judges, and all the law lords, decided, with unanimity, and without hesitation, that the charge contained in the indictment, as far as it related to the multitudinous meetings, amounted merely to a charge that the defendants had attempted to produce changes in the laws and constitution of the country, through the medium of making a display of large numbers of persons as being favourable to the change; and this conduct the Court of Queen's Bench in Dublin adjudged to be indictable at common law. If this most monstrous decision had remained unreversed, it must have either stifled all manifestation of public opinion by large numbers in Ireland, or been productive of, and followed by, a revolution in that country; or would probably have generated both these results in the regular order of succession in which they have before now followed each other in Ireland and elsewhere; and we should find a new form of suppressing the liberty of action, of writing, and of speech, introduced under the "authority of the

case of the Queen v. O'Connell," to which the learned reporters of the Queen's Bench in Ireland, mixing their own knowledge with the judgment of the Court, may annex a marginal note in the following, or some equivalent form:—

" In an indictment for a conspiracy to produce
 " changes in the laws and constitution, through the
 " intimidation to be produced by the exhibition of
 " great physical force—The word intimidation,
 " although not a technical word—not *vocabulum*
 " *artis*—and although not having of necessity any
 " meaning which indicates any thing illegal, and
 " although a word in common use, may be employed
 " in its popular sense; and in order to give it force,
 " it need not appear from the context what species
 " of fear was intended.

" And the counts need not contain any intima-
 " tion whatever upon what persons this intima-
 " tion is intended to operate; and it may be left in
 " complete uncertainty, whether the intimidation
 " were directed against the peaceable inhabitants
 " of the surrounding places, against the subjects
 " dwelling in Ireland in general, against persons
 " in exercise of public authority there, or even
 " against the legislature of the realm.

" Although the mere allegation that these changes
 " were to be obtained by the exhibition and demon-
 " stration of great physical force, means no more
 " than the mere display of numbers."

It will be observed that the English judges in overruling this decision of the Irish Court of

Queen's Bench, dwell upon the absence from the counts of certain allegations. Their lordships, however, *do not go on to say that, EVEN IF THE ABSENT ALLEGATIONS WERE PRESENT, the counts would be good.* Whatever may be their actual opinions upon this particular point, they, for the present, have expressed none. For our own part, we are humbly of opinion, that the addition of the allegations in question would "carry the case no further," and that it is impossible to conceive how the defendants, in this case, could have been guilty of the offence imputed.

Let us, in the first place, imagine that it had been alleged that the intimidation was to be exercised upon the peaceable inhabitants of the surrounding places, and that no objection is made to the want of a precise and legal meaning in the word intimidation itself. It is notorious, as a matter of fact, that the meetings in question every where contained the whole population of the neighbourhood, who, therefore, could not possibly intimidate any body but themselves. Indeed the Solicitor General expressly states, that if such an allegation had been made in form, it would have been disproved in fact by the evidence. The following passage upon the subject is taken from the reply* : —

" I say that every one of these monster meetings, and many others which have been given in evidence, are unlawful meetings, NOT *because the people in its vicinity were frightened, or apprehended any immediate injury to their property,*" &c. In

* Page 405.

the account which the Solicitor General dwelt upon in his reply of the proceedings connected with one of the largest of the meetings, he read the following passage* :—“ Cars and other vehicles “ *were* CROWDED *with* FEMALES, CHEERFUL and “ *lovely*, who were determined to have some portion “ in the achievement of the domestic felicity “ which was to follow independence.”† It was therefore of course impossible that any allegation of alarm to the neighbourhood could have been introduced upon the record by the Law Officers of the Crown, *who themselves knew that such allegations would be totally false* : whilst it would of course not only be untrue but absurd to assert that a meeting which produced no alarm in the neighbourhood could produce alarm at a distance.

But let us suppose an assembly of an hundred thousand persons, a majority of which consisted of women and children, and which from the beginning to the conclusion was, according to all the authorities, attended with no breach whatever of the peace ; let us, moreover, suppose that some dozen or dozen dozens of persons, there or elsewhere, were actually alarmed at such meetings ; how is it conceivable that such alarm could produce any alterations in the law ? No change can be effected in the law except by the authority of the legislature. How, then, is it conceivable that the act of alarming

* Page 426.

† See, page 162., the policeman’s description of the meeting at Mullaghmast — the largest of them all.

a few persons, or even a great many persons any where in Ireland, could have the effect of causing any change in the Laws of the Empire, except, perhaps, by inducing the Government to procure an Act of Parliament for the restraint or the punishment of those by whom the alarm had been created? If any new law could have been the consequence of such alarm, it must have been a re-enactment of the Coercion Bill, not a repeal of the Union.

But let us proceed still further, and suppose that the counts did actually contain an allegation, that the purpose of the defendants was to intimidate the legislature itself by the exhibition of great physical force. All the cases of this kind that have ever occurred, including the cases that were cited by Chief Justice Pennefather himself, were cases where the physical force was exhibited and demonstrated in the vicinity of the parties upon whom the intimidation was to be effected, and where the exhibition of the force was accompanied by an actual, or threatened, or probable violation of the peace. We ask, then, in the name of common sense, how is it possible that the exhibition of great physical force in* Mullaghmast could alarm the legislature in Palace Yard? The meeting may produce upon the mind of the legislature some very serious impressions in reference to the subjects which had been agitated in the assembly itself; but we cannot see

* As a matter of fact, when several of the meetings occurred, there was no legislature in existence to be intimidated, as the Parliament had been prorogued at the time.

how it is possible that the parliament in Abingdon Street could be physically intimidated by the fact, that a hundred thousand men, women, and children had assembled *in the most peaceable manner* upon the Hill of Tara. Chief Justice Pennefather, in his charge to the jury, asserted the illegality of the meetings, upon the ground that they were entirely under the control of Mr. O'Connell, and that he, from time to time, issued advice, and even commands, to the people of Ireland, to avoid all connection with Chartists or secret societies, and to abstain from physical force and every species of crime. These injunctions were described by the Chief Justice as having been continued without interruption throughout the whole of the three years after the Repeal Association came into existence; and Mr. Justice Burton, speaking in the name and in the presence of the whole Court of Queen's Bench, declared in the very act of pronouncing the sentence, that the Court entertained no doubt about the sincerity of the parties who had continually issued such injunctions. The prosecution itself, therefore, which proceeded upon the ground of illegal intimidation, demonstrated, as it advanced, the absence of the foundation upon which it was professedly constructed. It is of course very possible that such assemblages *may* be illegal upon other grounds of different kinds, according to the conduct of the parties who direct and attend them. But is it not a most palpable absurdity to presume

that meetings which, however numerous, were *deliberately, pre-eminently, and unprecedentedly peaceable*, could produce personal terror any where, much more at a distance of three hundred miles ?

We next proceed to consider the charge which related to the attempt to establish Arbitration Courts in Ireland, in regard to which it may, in the first instance, be observed, that a prosecution for inducing individuals to submit their differences to arbitration must proceed in ignorance, or in defiance of the principles of morality. All ethical writers lay it down as the duty of every man to submit his cause, if possible, to arbitration. The obligation is expressed by Paley in the following words: " But since the suit " is supposed to be undertaken simply with a view " to the ends of justice and safety, the plaintiff " in an action is *bound* to confine himself to the " cheapest process that will accomplish these ends, " as well as to consent to any peaceable expedient " for the same purpose, *as to a REFERENCE, in which " the arbitrators can do what the law cannot.*"*

If it be a moral duty to submit our causes to arbitration, it must be a virtue to recommend the submission. To prosecute a man for promoting the establishment of arbitration courts is to prosecute him for performing the moral and religious

* Principles of Moral and Political Philosophy, book iii. part ii. ch. 10, art. "Litigation."

duty of promoting "peace and good-will amongst men." Independently of thousands of individual cases which are so decided every day, there are numerous classes of partnership deeds in which it is provided that all disputes of every kind which may arise out of the partnership itself shall be settled in that manner. Many societies of a larger extent and looser composition proceed upon the same principle, either by the force of some statute or their own internal organisation. Some considerable departments of the population act upon the same plan, as the Jews, the Methodists, and the Society of Friends. The tendency of all modern legislation*, as well as of the decisions of all the Superior Courts of Law and Equity, has been to increase the facilities for this method of decision, to enlarge the jurisdiction of arbitrators, and render their powers more extensive and effectual; and Lord Brougham himself brought into the Legislature some years ago a measure to render the practice of arbitration in a manner universal. The attempt to establish arbitration courts in Ireland arose, in fact, out of the absurd and impolitic dismissal of a large number of magistrates throughout the country, and might be charged against the Lord Lieutenant and the Lord Chancellor more properly than against the leaders of the Corn Exchange.

Speaking upon this subject, the Solicitor General himself observes†, "Gentlemen, when you consider

* See particularly the 3 & 4 W. 4. ch. 42.

† Page 445.

"the time when the selection of these arbitrators
 "was determined upon, when you recollect that
 "the *dismissal of the magistrates by my Lord*
 "*Chancellor was the reason and the occasion* why
 "this *was* THOUGHT OF," — "when you recol-
 "lect that the *dismissed magistrates are the per-*
 "*sons selected* to adjudicate between the different
 "classes of the people, you can have, in my opi-
 "nion, no doubt whatever that there was a
 "settled plan to disparage the regular tribunals,
 "&c." This conclusion would, however, seem to
 an impartial reader to be singularly destitute of
 any support from the premises. Most persons
 would, instead of thinking that the facts here
 mentioned afforded any evidence of a "settled
 "plan," be inclined to conclude that the notion
 of setting up Arbitration Courts was actually
 generated by the dismissal of the magistrates.
 Indeed the Attorney General expressly says * that
 the attempt to establish those courts "was the
 "more illegal. because *it was adopted* IN CONSE-
 "QUENCE of the exercise of the right of the Crown to
 "*dismiss the magistrates* who attended the multitu-
 "dinous meetings;" whilst the Solicitor General
 himself elsewhere gives the quietus very effectually
 to his own theory, by saying, "As soon as it was
 "*ascertained* that the gentlemen who had attended
 "those meetings *had ceased to exercise magisterial*
 "*functions,* the plan of substituting for the ordinary
 "tribunals others to be filled *by the very persons*

* Page 138.

*“ dismissed OCCURRED to the persons connected with this conspiracy.” **

We have already shown that the act of uniting for the purpose of inducing the subjects of the Queen to submit their differences to arbitration is absolutely and considerably meritorious. Such a charge in that form would, in fact, be ridiculous in an indictment, and therefore it was placed upon the record under the more serious description of “ a conspiracy to bring into hatred and disrepute the courts by law established for the administration of justice in Ireland, and to diminish the confidence of Her Majesty’s subjects in Ireland in the administration of the laws therein, with intent to induce the said subjects to withdraw the adjudication of their differences with, and claims upon, each other from the cognizance of said courts, and to submit them to the decision of other tribunals to be constituted and contrived for that purpose.”

The extracts already given from the speeches of the Attorney and Solicitor General are, however, sufficient to demonstrate that the real guilt of the defendants was the honour which they conferred upon the magistrates who had been dismissed by the Crown ; and the Chief Justice puts that point altogether out of doubt by the following very gross piece of misdirection upon the subject † :— “ It will be for

* Reply, Flan., p. 431.

† Page 188.

"you," says his Lordship, "to say whether the Arbitration Courts were not set up for an entirely different purpose, with *something!* of a *factionous* view of *opposing the Government* in the course they had taken in dismissing from the commission of the peace the magistrates who had attended the repeal meetings." * This new sort of offence, which consists in doing an act "with *something* of a *factionous* view of *opposing the Government*," is as great a curiosity in its own line as the terrible Irish conspiracy, which consisted

* The futility of the pretence upon which the Chief Justice addressed the jury in reference to this point has been laid bare in the plainest manner within a day or two by the conduct of the Government itself in the case of Lord Lucan, whom they have appointed to the lord-lieutenancy of the county of Mayo, after having, upon a deliberate examination of his conduct as a magistrate, expelled him from the commission. If the repealers elect to the office of arbitrator a justice who has been dismissed by the Crown for political reasons, they are, it seems, to be considered as acting from the *factionous* view of opposing the Government: but the Government is to be taken as acting with perfect propriety when they place at the head of the magistracy a person whom they had themselves deliberately stigmatised as unworthy, from his magisterial misbehaviour, to be even a private member of the body. This proceeding, after all, if properly understood, may be only an additional sample of that "bold, straightforward, and manly" conduct for which credit was assumed by the Solicitor General. Taken in conjunction with the case of Mr. O'Driscoll and others, it will afford a proof of the propriety of prosecuting Mr. O'Connell for a seditious conspiracy, upon the ground of his having complained of the provisions made by the Government for the administration of justice in the Irish courts of petty sessions, and of his uniting with other persons to withdraw the confidence of the public from such tribunals as those of Skibbereen, Clonakilty, and Castlebar.

in a combination NOT to violate the law, and is worthy to be ranked along with the several other sorts of novel criminality invented for the purpose of procuring the conviction of Mr. O'Connell *per fas aut nefas*.

The objections made by the Chief Justice to these appointments, upon what may be called the merits, are most extraordinary. He objects to the manner in which the Chairman of the Arbitration Courts was to be elected, upon the singular ground that he was to be chosen to that office—"not on account of his "LEGAL knowledge, local or other information, or pro-
"perty, but because, *having been a magistrate*, he has "either been dismissed for attending repeal meet-
"ings, or has himself resigned the office." Now, one should suppose that the Chief Justice of the Queen's Bench would assume that a person who *has been actually appointed by the Crown to administer justice, and who has been for some time employed in the actual administration of it*, MUST possess all the qualities of every sort which are necessary to enable him to discharge, with efficiency, that most important duty — knowledge, temper, judgment, integrity, impartiality; as well as all necessary information, *local and legal*, together with such amount of *property*, as is required by law. These qualities it is but reasonable to presume that he possesses, whilst his name appears in the Commission of the Peace by the authority of the Crown. No sooner, however, has he been removed from the roll than, according to the theory of the Chief Justice, his whole nature

becomes deteriorated, and in part annihilated — his *legal*, even his *local* knowledge becomes extinguished ; his education becomes reversed or undone, his very property vanishes away, and all the qualities by which he was enabled to administer justice, whilst he was the commissioned magistrate of the Crown, become annihilated as soon as he has been elected an arbitrator by the people. If the arbitrators did, in fact, possess these qualities, the observations of the Chief Justice are quite irrelevant. But if they were wanting in the necessary knowledge of the laws, as well as in the other qualities required for the administration of justice, how did it happen that they had been appointed to the Commission by the Crown? Is it the Chief Justice's opinion that a knowledge of the law is necessary in an arbitrator elected by the people, and not necessary in a magistrate appointed by the Queen?

The reader, who has by this time received some insight into the manner in which Chief Justice Pennefather dealt with the facts of the case, will perhaps not be surprised to hear that the persons recommended by the "Report," to which his Lordship referred, were those "possessing *education*, "*high MORAL character*, and *local influence*, together "*with the full and complete confidence of the parties upon whose cases they may have to arbitrate.*"* As the Chief Justice did not read this passage to the

* Arm. & Trev., p. 100. 224.

jury, we presume that it must have altogether escaped his Lordship's notice.*

In the course of his observations upon this subject, the Solicitor General read a passage from a speech, in which Mr. O'Connell expressed a hope that "before twelve months more should have passed over, the Four Courts would be abandoned." It would certainly not be very wonderful if the Forum should be deserted in a capital where the Custom-house is said to be falling down for want of an occupant; and that litigation should languish where commerce is in a consumption. It is difficult, however, to decide which of the two parties was less in earnest — Mr. O'Connell, in pretending to anticipate, or Mr. Green, in professing to apprehend, the total desertion of the Four Courts, as the consequence of establishing a system of arbitration to fill up the vacancies which were made in the

* The Chief Justice tells the jury (a) that the arbitrators are to be persons "not known to the party," — a statement which is evidently in direct opposition to the fact, as the arbitrators, according to the very report, of which the Chief Justice read a part, were to be, as we have just mentioned, "persons *possessing LOCAL influence, together with the full and complete confidence of the parties upon whose cases they are to arbitrate.*" Out of Ireland, at least, it would be difficult to understand how a man possessing *local* influence in a locality where he has acted as a magistrate can, after he has been rendered much more conspicuous by being removed from the office, be unknown to a person in the same locality, who places at the same time the "most full and complete confidence" in this dismissed magistrate whom he does not know!

(a) Page 196.

petty-sessions bench by the removal of the Repeal magistrates.

With regard to the alleged offence of bringing the courts of justice into contempt, it is one which can scarcely be committed without the assistance of the courts themselves. A person, for instance, who should attempt to bring into contempt the Superior Courts of Law in England at this time would only bring contempt upon himself, if he should happen to be otherwise of importance enough to be the object of such a feeling. There are other tribunals, however, which deserve, or are supposed to deserve, the contempt of the public, which contempt is invoked upon them continually by speakers and writers of all classes and all parties, who are so far from being considered as committing an indictable misdemeanor, that their conduct is universally regarded as highly beneficial to the community. If the absurdity, the precipitancy, the partiality, and the ignorance which have been lately exhibited in those other tribunals should ever, *quod absit longe*, come to supplant in the Superior Courts at Westminster the sound learning, good sense, candour, calmness, impartiality, and integrity which generally distinguish those high tribunals at present, it would unquestionably become the duty of every man who took a part in public affairs to collect upon those courts as much as possible that universal odium and contempt which, in such a state of affairs, if such

a state were possible, they would as justly deserve as they now do the esteem and admiration of the whole empire.

The following passage exhibits the great authority of Lord Denman* in support of these observations: —

“In the first place, it is my bounden duty to state that I do not entirely agree with the learned Judges in thinking that there are only two objectionable counts: it appears to me that there are other counts open to very serious objection; and I should be sorry to preclude myself, by any thing which I may now say, from giving a judicial opinion against counts so generally stated, and *charging as an unlawful act a conspiracy to excite dissatisfaction with the existing tribunals* for the purpose of procuring a better system. I am by no means clear that it may not be *an innocent and a most meritorious act*: I am by no means clear that there is *any thing illegal involved in exciting disapprobation of the courts of law, for the purpose of having other courts substituted more cheap, efficient, and satisfactory.*”

The truth is, that courts of justice can be effectually brought into contempt by their own members alone. “Their enemies are of their own household.” The administration of justice is a matter of necessity so overwhelming and so obvious to the most uninstructed of mankind, that it may be safely asserted that the pub-

* Judgment in the case of O’Connell v. The Queen, page 19.

lic confidence in a tribunal will never be less than it deserves, and will generally, perhaps, be greater. That any conspiracy can have the effect of inducing parties to withdraw the adjudication of their differences from courts which are composed of learned, enlightened, candid, patient, and impartial judges, is a supposition purely ridiculous. To suppose that suitors could be induced by the "malicious contrivances" of any conspirators, however subtle, to withdraw their suits from such courts as we have described, is simply to suppose that the suitors are insane. Whenever the confidence of the public is actually withdrawn from a court of justice, it will be invariably found that the court is not entitled to confidence; and the only effect of a prosecution upon such a ground is, in the first place, to make the want of confidence notorious; and, in the next place, to make it greater than before. The court which tries the charge, and which deserves the imputation, will, in all probability, treat the offence as a personal matter, and exhibit so much perverse passion and precipitate partiality as to justify the defendants for the diminution of their confidence in the tribunal, and to show that what the Court punishes as an offence against the Court, is a meritorious act with regard to the public at large.

Nothing can be more absurd or more futile than a prosecution, having for its object the repression of a sentiment, which in the circumstances is natural

and inevitable. The security of a court of justice for its character and existence depends upon its deserving the support of the just and enlightened portion of the public; and we may say of such an institution what Montesquieu* has truly asserted of government at large — “*Elle est comme toutes les choses du monde : pour le conserver, il faut l'aimer.*”

But if it be an offence to attempt to bring a tribunal into contempt, the extent of the offence in any particular instance must be in the direct ratio of the dignity, importance, utility, and established character of the tribunal, and of the degree which that particular tribunal occupies in the ascending scale of the general jurisdiction of the country. If, therefore, it be an offence to bring the Irish Court of Queen's Bench into contempt, it must be a still greater offence to depreciate in public estimation the character of the House of Lords, as the court of the highest dignity and of ultimate appeal in the administration of justice throughout the empire; and if such conduct be a “high misdemeanour” in any man, how much higher in one who is himself a constituent member of the Court, peculiarly bound by every consideration of duty to maintain the dignity of the body to which he belongs. After the judgment in the case of *The Queen v. O'Connell* had been delivered in the House, Lord Brougham committed the outrageous impropriety of publicly declaring, in his place as a judge of that high court, that its “judgment would go forth without authority, and

* De L'Esprit des Loix, lib. iv. chap. v.

“return without respect;” and this statement he made immediately after he had himself decided that it was an indictable misdemeanor to make any attempt at bringing into disrepute or withdrawing the public confidence from the courts of justice in Ireland. A learned Judge of one of the Superior Courts, whose name it is unnecessary to mention, has also given the “Running Rein” to his humour in the same direction, and has frequently and publicly alluded to the judgment of the House of Lords in terms not particularly respectful; whilst a couple of London newspapers have repeatedly, and in the most express, direct, and open manner, charged with political partiality and corruption the majority of the Lords by whom the case was decided. If, then, Lord Brougham and the learned Judge in question, and the editors of the *Standard* and *Herald*, should be indicted for having combined to induce the subjects of her Majesty to withdraw their confidence from the highest court of justice in the empire, and to bring that court into discredit and disrepute, what defence could they, upon their own principles, make to the indictment? Is it an offence in Dr. Gray and Mr. Steele to bring an Irish petty sessions court into disrepute, and no offence in Lord Brougham and a judge of a superior tribunal to assert that the judgment of the House of Lords was neither entitled to be obeyed as an authority, or even treated with respect; and to commit this outrage upon the highest judicial institution in this country—whilst they were themselves actually exercising judicial

functions, and sitting and acting in a judicial character? Is the act of bringing the courts of justice into contempt an offence in every one except the members of the courts themselves? Is it to be exclusively committed by those who consider it to be an offence, and not by those who think it to be meritorious? And is the protection of the Attorney General to be confined altogether to the Irish magistrates, of whom a considerable portion have been in the habit, notoriously and prescriptively, of receiving bribes of all values, from a fat cow to a leg of mutton, or a day's labour in harvest, and who have been in the habit, although not recently to the same extent, of committing every enormity which could be crowded within the limits of their capacity for evil? *

* As the public are sufficiently familiar with the manner in which justice is administered in the Irish courts of petty sessions, we shall only trouble the reader with a statement of the latest of these disgraceful exhibitions that has been recorded in the Irish correspondence of the London press. It appears that a petty sessions court was held at Castletown (Bearhaven, county of Cork), within a few days, and that amongst the *worshipful* individuals present was a justice who thought that he had reason to complain of a report which had recently appeared in a Cork newspaper concerning some preceding transactions. Upon this matter the magistrate, before the commencement of the proceedings, made a public address, towards the end of which he said, that "he had thought it right to make these remarks, and he now hoped that the author of the letter would have the manliness to come forward, and not be *an assassin in the dark*; but if he continued to hide behind an anonymous signature, all he [Mr. —] would say was, that nothing could exceed his contempt for the *malicious scoundrel*."

At the conclusion of the proceedings the subject was again resumed, and

The Government, whose own conduct affords the most copious and convincing examples of the gross and obvious impropriety of every part of the accusation against Mr. O'Connell, as well as of every part of the prosecution of the charge, have, within a day or two of this present 11th of February, furnished an additional example of the facility with which they may themselves commit with impunity what they have made the subject of an indictment against their political antagonist. The Lord Mayor of Dublin, attended by certain aldermen and town-councillors, along with their Town-clerk, waited upon the Lord Lieutenant, who was attended by *Mr. Green, the Solicitor General*, for the purpose of representing *the Court of Conscience in Dublin AS A NUISANCE, and recommending its abolition as such.* The *Lord Lieutenant* and the *Solicitor General*

Mr. — observed, "Whoever furnished the report to the *Examiner* gave a false report, and that I state publicly and fearlessly."

Mr. —. "He is subject to a prosecution."

Mr. —. "What mark would *the scoundrel* be for costs?"

Mr. —. "I mean a criminal prosecution."

Mr. —. "He had better be cautious."

He certainly had. After the specimen which the justices of Bearhaven — misprinted, perhaps, for *Beargarden* — have given of their calmness and impartiality, if the "*scoundrel*" in question allows himself to be impleaded before their tribunal, his folly must be at least as great as his malice. The account of the same to which we refer is contained in the *Morning Herald* of the 17th of February. Since the preceding part of this note was written one magistrate in another county (not Cork) has been dismissed by the Lord Lieutenant for oppressing a poor man under the forms of justice; and the case of a second worshipful individual is under consideration.

assented to the *correctness of the representation*, but hesitated about the abolition until some substitute should have been provided for the existing Court, which seems to be the only tribunal for the recovery of small debts in the city of Dublin. Upon the part of the Deputation it was proposed to make certain manor courts in that place available for that purpose, but the Solicitor General declared that he knew *officially and professionally that the manor courts themselves were so incurably bad, as to be incapable of any amendment.*

The following is the whole of the evidence which was produced with regard to the charge of setting up the Arbitration Courts : —

“CHARLES HOVENDEN *sworn, and examined by*
MR. BREWSTER.

“I am an Inspector of Police. I know Dr. Gray
“and Mr. John O’Connell. I saw them both *act-*
“*ing as arbitrators.* I saw Dr. Gray act but once
“as arbitrator. I have seen Mr. John O’Connell
“*several times.* I first saw him on the 17th of
“October. I saw him *several days subsequently*
“acting as arbitrator. There was *one case the*
“first day I attended the court, and there was *no*
“*case on the subsequent days.*”

“*Cross-examined by* MR. HATCHELL.

“I was not there on the commencement of the
“proceedings of the first day. I went there about
“a quarter past eleven. I went in and out once or
“twice; no obstruction was given to me, quite the
“reverse. There was the greatest kindness shown

“me. They stated they had no power to do
 “any thing, except by consent of the parties. I
 “saw no fees paid, no persons pleading. The par-
 “ties wishing to have their differences settled did
 “consent. *There was nothing done in the case*
 “*that was brought on ; it was adjourned to Kings-*
 “*town.* I was not present when it was finally
 “decided. *I did not see any case decided.* I
 “went there in uniform. I did not go there by
 “the direction of the arbitrators. I went there in
 “performance of my duty as Inspector of Police.
 “I did not go there as officer of the court. I gave
 “no previous intimation that I would go there. I
 “saw no oaths administered.” *

Such is the very prosperous account which the witness gives of the success with which the arbitration system upon the voluntary and popular principle was attended in the immediate vicinity of the city of Dublin, where the only one of Her Majesty's courts in which a “small debt” can be recovered is asserted by the Lord Mayor, and admitted by the Lord Lieutenant and the Solicitor General to be a nuisance which deserves to be abolished. Such were the practical results of the awful combination, which was pompously described upon the monster indictment, as a conspiracy “to bring into hatred
 “and disrepute the courts by law established for
 “the administration of justice in Ireland, and to
 “diminish the confidence of Her Majesty's subjects
 “in Ireland in the administration of the laws therein,

* Armstrong & Trevor, p. 294.

“ with intent to induce the said subjects to with-
 “ draw the adjudication of their differences with and
 “ claims upon each other from the cognizance of said
 “ courts, and to submit them to the decision of other tribu-
 “ nals to be constituted and contrived for that purpose.”

Several sittings—no fees—one case—no decision :
 not even a fragment of a hearing, their arbitra-
 torships having adjourned the judgment, and
 entered a *curia advisare vult*, not wishing very
 probably to part with their only cause until they
 had some chance of receiving another. Such was
 the competition against which Her Majesty’s Go-
 vernment thought it necessary to protect Her
 Majesty’s courts of justice in Ireland by calling
 before the jury a policeman to swear that he saw
 Mr. Gray and Mr. O’Connell sitting *in court*, i. e. in
 a small newsroom, first of all *doing nothing* in the
one case that was brought before them, and then
 adjourning the future non-performance of their
 duty to some other *court*, where they were again
 judicially to assist each other in this negative in-
 dustry. The witness, who wished to make the
 most of his materials, deposed that he saw Mr. John
 O’Connell acting as arbitrator upon several oc-
 casions after the adjournment of *the one cause*.
 How he could have acted as arbitrator without
 having any thing to arbitrate about, it is rather
 difficult to understand. Mr. John O’Connell must
 have sat in such circumstances, not like an arbi-
 trator upon a reference, but

“ Like patience upon a monument ”
 Smiling at — *Gray*.

The reader will perceive that this important *séance* was holden upon the 17th October, *after the swearing of the depositions upon which the indictment was founded*. So that, if the defendants had not sat upon that occasion, the evidence would not have contained a *single act performed by any of the defendants in practical furtherance of this alleged conspiracy* to transfer all the business from the Four Courts to "other tribunals to be constituted and appointed for that purpose." In reference to this charge, all the defendants except Mr. Tierney were found guilty for conduct which we have shown to be meritorious in its intention, and merely ridiculous in its result. Those who are accustomed to the administration of justice in England can find it difficult to comprehend how any jury could have had the effrontery to return a verdict of guilty upon such a charge upon such evidence.

To the sixth and last charge, of conspiring to intimidate the "Lords Spiritual and Temporal," by seditious and inflammatory speeches and writings, addressed to large numbers of persons, may be applied many of the observations which we have made upon the preceding parts of the indictment. The eleventh count, which is the only one which contains this charge, is the only one that states the persons who were said to be the objects of intimidation. The fact principally relied upon against Mr. O'Connell, in support of this charge, was his openly declaring that the statute of the 39 & 40

Geo. 3. c. 29., known as the Act passed for the union of the two countries, was void. This declaration, which Mr. O'Connell has merely repeated after Saurin, Plunket, and Bushe, was frequently stigmatised as not only inflammatory but seditious by the law officers of the Crown and the Chief Justice of the Queen's Bench.* But if the speech were justly characterised by those personages, nothing could be easier than to frame an indictment, consisting of a single count, against the person who spoke it. His conviction must, according to the crown lawyers and the Court of Queen's Bench, have been a mere matter of course. "It would not," however, "*do*" to prosecute Mr. O'Connell directly and solely for the use of language which, whether seditious or not, is very much inferior in the intensity of its character and in its inflammatory tendencies to that which is used every day by the persons who address "large numbers of persons" in England "for the purpose of intimidating the Lords Spiritual and Temporal, and the Commons, in Parliament assembled, and of thereby bringing about changes and alter-

* The Chief Justice, in dwelling upon one of Mr. O'Connell's assertions regarding this matter (*a*), says, "It is *absurd and seditious!*" — that the statement has *no distinct or consistent meaning at all*, and that the meaning is *not only distinct, but indictable!* To this piece of judicial perspicuity we may apply the passage of the satirical poet : —

"To die for treason is a common evil,
"But to be hanged for nonsense is the devil."

(*) Page 27. of the Charge, published by the Queen's printer.

"ations in the laws" of this country. A meeting which took place at Rochdale on Thursday the 9th of January last furnishes a very satisfactory sample of the sort of language which is *not* seditious in England. One of the speakers asserted that the new poor law was a "*confiscation of the rights of Englishmen,*" and that the authorities who administered it "sought out for men who set no value upon conscience, had no feeling for their fellow-creatures, and were therefore capable of carrying out to the full *the punishment to be inflicted on the poor.*" Another pronounced the poor law to be "*murderous* in its operation;" another designated the *three Commissioners* appointed to carry it into effect as the "*three devil kings of Somerset House;*" another asserted that the law in question "*disinherited MILLIONS of their birthright,* stamped on their foreheads the brand "of slavery, and went far to the *dissolution of SOCIETY ITSELF.*" No language given in evidence upon the monster trial made any approximation to this in its inflammatory tendency. Is it then seditious to say *in Ireland* of one statute that it is not binding upon the consciences of the people of Ireland, and *not* seditious to say *in England* of another statute that *it was passed for the purpose, and is followed by the effect, of MURDERING the population of England?* Is it seditious to say *in Ireland* of one statute that it has not had the effect

of uniting the two countries, and *not* seditious to say *in England* of another statute that it has almost *dissolved society*? Is it seditious to say *in Ireland* of one statute that it has not produced a union, and *not* seditious to say *in England* of another statute that *it has introduced anarchy*? Is it seditious to say *in Ireland* of one statute that it has “withered” the resources of the people of Ireland, and *not* seditious to say *in England* of another statute that *it continually MURDERS the population of England*? If this distinction do not exist, how comes it that language is prosecuted in Ireland which is not prosecuted in England? As far as the law of the case is concerned, there could be no more difficulty is framing an indictment against the repealers of the statute of Wm. IV. than there was in framing an indictment against the repealers of the statute of Geo. III. There is the same unity and continuity of purpose: that purpose is to procure the repeal of the New Poor Law, through the means of addresses expressly appealing to and exciting the passions of the *millions* who are *said to have been* ROBBED, *and to be in the process of being* MURDERED, *by the law*. There *exists*, therefore, every one of the elements which were *said* to enter into the composition of the guilt of the defendants in the case of *The Queen v. O’Connell and others*—the unity, the continuity, the inflammation, the intimidation,

the combination. The grand principle of Mr. O'Connell's agitation—that which in fact includes, and which, if well founded, would most abundantly justify, all the others, is, that impartial justice is not done to his country—that justice is meted forth to the people of England with a measure very different from that which is applied in respect to the people of Ireland. He has occasionally, in support of this principle, submitted for the consideration of the public certain occurrences which have not always appeared to be altogether conclusive. Sir Robert Peel, however, who has more than once unintentionally helped Mr. O'Connell out of a difficulty, has now furnished him, in the monster prosecution, with a proof and a justification which cannot be either obscured or misunderstood. Mr. O'Connell *complains* that the Irish tribunals are so constituted and composed as not to deserve the confidence of the people of that country: Sir Robert Peel institutes a prosecution which *proves* the fact. Mr. O'Connell complains of the difficulty and danger which the state of the law in Ireland places in the way of free and public discussion: Sir Robert Peel answers him by an indictment, of which the principal portion consisted of counts of which there never had been an example since the formation of the common law, but which the Irish Court of Queen's Bench deliberately declared to be unexcep-

tionable, whilst all the judges and law lords of England declared that they were not worth a straw, but which, if they had remained unrepealed upon the record of the original prosecution, would have left all future public discussion in Ireland altogether at the mercy of the Crown. It would be easy enough to amplify this comparison to a much greater extent; but our limits prevent us from carrying that part of the case any farther at present.

As the facts connected with the progress of the trial itself received more of the public attention, and were more distinctly perceived and more correctly appreciated, than the subject matter of the prosecution, or the principles and consequences which were involved in its form, character, and conduct, we shall not enter at any great length upon the actual occurrences of the trial itself; we shall merely glance at the most prominent points of the transaction, for the purpose of showing the general spirit which actuated the Court and the prosecutors throughout, and of exhibiting to the people of England the course of proceeding which was adopted for the purpose of repressing the loud complaints which have been so continually made in Ireland of the manner in which justice is administered in some at least of the tribunals to one class of the population of that country.

Having already examined at some length the

character of the indictment itself, we shall in this place recur to only the charge contained in the sixth and seventh counts, in which it was attempted to establish the monstrous doctrine, that to induce large numbers of persons to assemble together and represent themselves as being favourable to a change in any particular law is an indictable offence in an individual, and that if two or more persons unite for the attainment of such a purpose, they are guilty of a conspiracy. If this "damnable doctrine and position" had been established in the law of this country, not only all hope of amendment in every part of the institutions, but every manifestation of public opinion upon the subject, must hang altogether upon the caprice of the Government for the time being. Yet the ministry and the law officers of the Crown, who attempted to establish this doctrine, have the hardihood to boast that in the course which they adopted upon this subject they kept within the bounds of the common law, and stood upon the ancient ways of the constitution. Where is there in the common law a precedent for the sixth and seventh any more than for some other counts of the indictment in *The Queen v. O'Connell*? The slightest, merest, most superficial inspection is sufficient to show that every one of the common law "authorities" relied upon by the prosecutors and the Court in support of that part of the indictment which related to the meetings gave the most express contradiction

to the assertions in support of which they were adduced: and the single circumstance of laying down in Ireland, upon the authority of Mr. Baron Alderson, a position which Mr. Baron Alderson himself, in conjunction with all the judges and law lords in England, repudiated afterwards in England, is a type and sample of the conduct of the Court and of the Crown throughout the whole of the proceedings. The Solicitor General is reported* to have stated "that the indictment in the *Queen v. Vincent*† was verbatim the same as the present." It seems to be true that in that indictment the first count to which the Solicitor-General probably confined the comparison, and which is given in a general form in the Report, resembles a portion constituting one fifth of the first count in the *Queen v. O'Connell*. In this count *four* overt acts were charged. But the second count was for conspiracy to procure large numbers to meet "*for the purpose of exciting* **TERROR** "*and* **ALARM** *in the minds of the Queen's subjects, &c.,* "*and to annoy, ALARM, disturb, and prejudice* **divers** "*subjects in the peaceable enjoyment of their property.*" The third count was for an *unlawful assembly*. The superintendent of police deposed upon the trial, that several persons called upon him, and complained that they "*were* **ALARMED** *at the meetings, and* "*requested him to send for* **MILITARY ASSISTANCE.**" The report of Messrs. Armstrong and Trevor‡ represents the Solicitor General as stating in the

* Flanedy, p. 414. † 9 Car. & P. 275. ‡ Page 685.

same place, that in the case of *The Queen v. Shellard* (9 *Car. & P.* 277.) the indictment was "like the present," *i. e.* like that of *The Queen v. O'Connell*. The indictment in the former case charged in the first count a conspiracy "*to make* INSURRECTIONS, RIOTS, AND ROUTS, &c., *to prevent* the execution of the laws, &c., *to procure* ARMS for carrying the conspiracy into effect, and that, in pursuance of the conspiracy, the defendants, with divers others, *riotously and routously assembled*, ARMED WITH GUNS, and while so armed made a *great riot and rout*, and ATTACKED and BROKE OPEN divers dwelling-houses of the liege subjects of our Lady the Queen, and WOUNDED *divers of the said subjects* and took from them *divers quantities of arms*." The second count was for *making an INSURRECTION*; and the third count was for a RIOT. Such are the cases which were used for the purposes of analogy and comparison upon the trial of Mr. O'Connell!!

But every step in the cause, from the original beginning to the final conclusion, exhibited the spirit in which the prosecution was conducted. The grand jury having come into court for the purpose of stating that an error had been made in the fourth count of the bill, by substituting the name of Mr. Tierney for that of Mr. Tyrrell throughout that count, the Chief Justice enquired whether any of the counsel of the traversers were present. Mr. M'Donogh, Queen's Counsel, answered that he ap-

peared upon the part of Mr. Tierney.* The Attorney General *objected to his addressing the Court on the ground that he had not OBTAINED A LICENCE from the Crown* to defend the traverser! This unparalleled piece of forensic meanness was immediately nullified by the declaration of the agent, that the licence, which is as much a matter of form as the wearing of a wig, had been obtained. Mr. M'Donogh, having thus got over this extraordinary objection, proceeded to make an observation upon the subject of the error which had been stated by the jury to the Court. The Attorney-General then changed his ground, and objected to any counsel addressing the Court upon the subject of the error at the present stage of the proceedings; after which he immediately went on himself to address the Court upon the subject in question, upon which he had said that no address ought to be heard!

An application was made upon the part of the defendants, and opposed by the Attorney General, for a copy of the caption, which according to Lord Holt is necessary, in order to enable a defendant "to advise with his counsel as to the plea to be pleaded." And, according to Sir Michael Foster, is "as necessary to enable him to conduct himself in pleading as the copy of the

* So printed in the report of Messrs. Armstrong and Trevor. This must, however, be a mistake, as Mr. Tyrrell must have been the party for whom Mr. M'Donogh appeared.

“indictment itself.” If the indictment against Mr. O’Connell had been found at the assizes, and removed by *certiorari* into the Queen’s Bench, *the caption would be actually added to the indictment by the officer, of his own mere motion, and as a matter necessary to the completeness of the record.* What motive the Government could have for refusing a copy of the caption, if they sincerely meant to give the prisoners a fair and impartial trial, as we are bound to presume that they did, it is impossible for us to imagine, and it would be, therefore, useless to dwell any longer upon the point. The application was refused by the Court; the Chief Justice making the extraordinary allegation that it had always been the practice of the Crown Office in *England* never to grant a copy of the caption along with a copy of the indictment! Every body acquainted with such matters in this country is aware that the practice here is *diametrically opposite to that which the Chief Justice asserted it to be*; whilst it appears upon the face of the Report that *no step whatever had been taken by the Chief Justice for the purpose of receiving any information from the Court of Queen’s Bench or the Crown Office in England* upon a subject which was so decidedly, but of course unintentionally, misrepresented by his Lordship. It is an indubitable fact, and a notorious one, that anybody applying at the Crown Office in London, for a copy of an indictment, obtains a copy of the

caption without asking for it, and as a matter of course; and that *that* is the reason why no motion is or can be ever made in court upon the subject in this country; the matter being in fact here attainable without any motion at all.

An application upon the part of the defendants for a list of the witnesses, was also refused by the Court. With regard to this matter, as to the former, the Chief Justice expressly stated, *what is most undoubtedly contrary to the fact*, that it is the practice in England not to grant the information in question. We take upon ourselves to affirm, on the contrary, that the usage of the Crown Office in England is to grant, *upon request, and as a mere matter of course*, a copy of the *whole indictment at once,—back and front, bill, caption, memorandum, WITNESSES, and all.*

The statements of the Chief Justice upon these points are truly extraordinary. He first asserts, confidently, that the practice of the English Crown Office is not to give the list of witnesses, or a copy of the caption, and this he asserts in a manner from which one would be naturally induced to conclude that he had received some authentic or official information upon the subject. When a London attorney makes an affidavit of the practice of the Crown Office upon the point, the Chief Justice objects that the attorney is not an actual officer of the Crown Office! He then contends that at any rate the practice of the office in England had never

been brought under the notice of the Court in England; from which it was of course to be inferred that he considered that the practice of the office was not binding, unless it received the express and deliberate sanction of the Court. He says at the very same time that the practice of the Court is the law of the Court, and upon this principle he decides the application before him upon the authority of his own officer as to the practice of the office; and he finally concludes by saying, that even *if* the practice in England should be to give the copies in question, (after he has expressly and repeatedly declared — but incorrectly — that the practice here was *not* to give the documents,) he would yet abide by the *negative* practice in Ireland, which is as contrary to common justice as it is to the common law, and to the indubitable *positive* practice in England. He declares, *contrary to the well-known fact*, that the law of the Court in England is not to give the documents. He then is informed, upon affidavit, that his opinion is unfounded. He says that there ought, besides the affidavit, to be a certificate from the Crown Office. *The defendants then offer to refer the whole question to be decided by such certificate; but, without waiting until such a document could be procured, he decides the case against them; and he says, at the same time, that if the certificate should be in opposition to his own views, he would not abide by it: so that there was no possible contingency in which the*

*defendants could have obtained, upon application to the Court of Queen's Bench in Dublin, a copy of the caption, or of the list of witnesses, BOTH OF WHICH THEY WOULD OBTAIN IN LONDON AS A MATTER OF COURSE, IN THE OFFICE, WITHOUT ANY MOTION AT ALL TO THE COURT.**

With regard to the list of witnesses, the reasoning of the Irish Chief Justice appears to us to be most extraordinary. He said that the real strength of a man's defence consisted in *his innocence*, and not in *his knowing the persons who were coming to prove his guilt*. If this very original principle were to have any influence in practice, it must operate to the extent of inducing every man to take no trouble about answering any criminal charge; and, instead of "putting himself upon a jury of his country," and taking human measures for his defence,

* If the reader will take the trouble to turn to the opinions which the Lord Chief Justice of England afterwards delivered in the House of Lords upon the part of all his judicial brethren, upon the error assigned by Mr. Steel, in reference to the subject matter of the plea in abatement (*a*), he will see that the *English judges* EXPRESSLY ASSUME *that the defendants* HAD RECEIVED, *before the trial, a list of the witnesses who had been examined before the grand jury*, and that they make such assumption the foundation of part of their reasoning upon the subject. The propriety of giving or not giving the list was not argued before the English judges at all, as that question was not upon the record; but those learned persons took for granted, as a matter of course, that the names of the witnesses would in Ireland, as in England, be given to the defendants for asking, or without.

(a) *Infra*, p. 242.

to leave his case altogether to the justice and mercy of the Almighty God. If this kind of argument had been used by the late Chief Baron Joy, after his return from Constantinople, it would be said that he had adopted it from the Turks, who attribute every individual occurrence to the immediate interposition of an antecedent, ever active destiny, and look upon all human interference as an impertinent intrusion into the department of Divine Providence. But even Turkish theology is not exactly the worst part of the sentiment, as will immediately appear from the other portions of the Chief Justice's statement. Speaking of this application of the defendants, he says,—
 “To enable them to plead to the charge which
 “appears upon the *face* of the indictment, that
 “which does not so appear need not be furnished.”*
 (The names of the witnesses are written upon the
 BACK.) The learned, temperate, and impartial
 Chief Justice proceeds to say, “Why are they to be
 “furnished with the names of the witnesses? *Their*
 “*defence, IF ANY THEY HAVE!!! does not depend*
 “*upon the names of the witnesses, but upon the*
 “NATURE OF THE CHARGE.”† “The defendants are
 “*not a whit benefited by knowing whether* the names
 “of the witnesses are A. and B., or C. and D.!!”
 Was there ever any thing more extravagant propounded from the bench of a Court of criminal justice? The defendant cannot be “a whit bene-

* Armst. & Trev., p. 40.

† Ibid.

“fited” by knowing the witnesses against him! although in consequence of such knowledge he may be able to prove that the witness was unworthy of belief, or was not present at the scene which he describes, or was the personal and political enemy of the defendant, or that he was incapable of estimating accurately, or of reporting correctly, the transactions to which he deposes. It would be an insult to the understanding of the reader to make any farther observations upon the necessity and importance to every defendant of knowing the witnesses by whom the charges against him are to be supported. In England*, by the joint operation of the statute and common law, and of the usage of the administration of justice, the names of the witnesses are known to every defendant as soon as the indictment has been returned; and even in regard to trials by court martial, it is expressly laid down, that among the duties of the Judge Advocate is that of giving the prisoner the *earliest intimation* of the charges against him, *and of the NAMES AND DESIGNATIONS of the WITNESSES by whom they are to be supported.*† In the present case, when the names of the witnesses came to be known, *after judgment had been delivered*, it appeared that *three-and-thirty witnesses* had been examined before the grand jury, and that *only NINE were produced*

* See *infra*, p. 242—244.

† Hough on Courts Martial, edited by George Long, Esq., Barrister-at-law, p. 52.

upon the trial; and that amongst the witnesses produced before the grand jury, but not produced at the trial, was Mr. Kemmis, the Crown prosecutor for the city of Dublin, and the Crown solicitor in this prosecution itself. The importance to the defendants of having an opportunity of cross-examining these witnesses, and especially Mr. Kemmis, upon whose affidavit the warrant was issued against the defendants, is as obvious as the gross want of candour and fair dealing on the part of the Government in keeping back from the public investigation the persons whom they had used for the purposes of the private inquisition. The Chief Justice, who was continually throwing out sneers and insinuations against the defendants, had the indecorum to insinuate his disbelief in the affidavit in support of the application which was made by the person employed to arrange and prepare the defence of one of the traversers, and who swore that he required "a list of the witnesses, for the purpose of enabling the traverser to defend himself with effect."* One of the judges upon the bench described this deponent as "a gentleman of respectability and veracity, and above all others qualified to form an opinion upon the point." The statement which was made by the deponent was obviously and eminently probable in itself, and no fact of any

* The necessity of the List, and the several grounds of such necessity, are stated in the fullest manner in a joint affidavit of the *five* attornies for the defence, *infra*, page 165, 166.

sort was alleged in contradiction of the statement or even in diminution of its probability. Yet the Chief Justice intimates that he does not believe it to be true, and Mr. Justice Crampton insinuates that “the parties *wanted the names*, NOT *for the purpose* of defence*,” but for some other, to which he affords no clue, except by this obscure and unjustifiable insinuation. The following extract from the judgment of Mr. Justice Perrin† affords a complete and compendious answer to the whole of the observations of the other members of the Court upon this subject:—

“I cannot see any good reason to refuse this application, and not to give the names of the witnesses endorsed on the indictment as they are now sought for. This application is perfectly distinct from that on which the former order of the Court was made. The motion on that occasion was to amend the copy of the indictment which had been furnished to the traversers, and it was, in my judgment, properly refused, on the ground that the names endorsed on the indictment form no part of it. This is an application made on the affidavit of the attorney, the gentleman who is employed to arrange and prepare the defence, of one of the traversers, and he swears that he requires a list of the witnesses’ names as

* Arm. & Trev. p. 112.*

† Arm. & Trev., p. 133 * and 114.*

“ essential to, and for the purpose of enabling the
 “ traverser to defend himself effectually. I think
 “ *there can be no doubt that it may be, and generally*
 “ *is very important to a man’s defence, as well to know*
 “ *who his accusers are, as what the extent of the*
 “ *charge is ;* and the statute which has been referred
 “ to, the 6 & 7 W. 4. c. 114., altering the state of
 “ the law in an essential particular, *proves this to*
 “ *be a sound principle, and also, in my mind, fur-*
 “ *nishes a complete answer to a good many of the*
 “ *arguments which have been urged against this*
 “ *application. The defence may depend much on the*
 “ *veracity and character of the witnesses who are to*
 “ *be produced on the part of the Crown. That may*
 “ furnish an important ground of defence for the
 “ consideration of the traversers and those engaged
 “ for them, and, as my brother Burton has ob-
 “ served, *it may be very material for the traverser, or*
 “ *the prisoner, to know, that certain witnesses will be*
 “ *produced on whose testimony he may be enabled to*
 “ *rest part of his case.* There is another distinct
 “ reason for giving him the names of the wit-
 “ nesses. It may be important for him to know
 “ this, with a view to avoid the necessity of looking
 “ for other witnesses to support his case in that re-
 “ spect. It is not necessary for me to go through
 “ the cases or instances in which it may be, or in
 “ which it may not be, essential to the traverser to
 “ know the names of the witnesses to be produced
 “ against him, because *the person who makes the*

“ *affidavit in this case is, above all other persons,*
 “ *qualified to form an opinion, and he has distinctly*
 “ *sworn that it is, according to his belief, essential to the*
 “ *defence of the traverser that he should be apprised of*
 “ *the names of the witnesses.* I was surprised to hear
 “ it asserted that he did not swear that the names
 “ were not known. I cannot conceive how any
 “ gentleman of respectability or veracity could
 “ swear that it is essential to his client to be fur-
 “ nished with the names of the witnesses, if he was
 “ conscious at the time that his client knew them.
 “ I think this affidavit *necessarily involves*, in every
 “ well-constituted mind, a distinct denial that he
 “ does not know the names. Because, if he does,
 “ it is in my mind not only an evasion, but direct
 “ false swearing. I perceive no sound objection to
 “ this disclosure; nor have I heard any argument
 “ which has satisfied me that it is desirable that
 “ the witnesses’ names should in general be sup-
 “ pressed. No special objection has been sug-
 “ gested at the bar in this particular case. I before
 “ adverted to the 6 & 7 W. 4. c. 114.: it does
 “ not show to me any objection nor any incon-
 “ venience that would arise from furnishing the
 “ names of the witnesses sought. By that statute
 “ the party accused is entitled to the names and
 “ depositions of all the witnesses sworn before
 “ he was held to bail or committed. I can see no
 “ inconvenience, *but a distinct reason for giving*
 “ *him the names of the witnesses* upon the indict-

“ment, for the purpose of informing him *whether*
 “*he is to make his defence against the depositions*
 “*alone, or whether any additional proof has been*
 “*given before the Grand Jury.* It appears to me,
 “therefore, that there is no sound objection in
 “general to such a course of proceeding.

“It is said there is no practice in this country to
 “give a list of the witnesses; or that the practice is
 “the other way. *I cannot find any instance in which*
 “*the names of the witnesses were ever refused;* and,
 “if they were never refused, it follows that there
 “was no necessity for making the application. So
 “that, with respect to that observation, it may be
 “taken that there is in this country no fixed or
 “settled practice on the subject. But it does ap-
 “pear to me, on the best consideration that I can
 “give to the documents which have been laid
 “before us, supported, as I think they are, by the
 “case to which the Attorney-General referred,
 “*Rex v. Gordon,* that *the practice in England is to*
 “*give the names of the witnesses endorsed on the in-*
 “*dictment in cases of misdemeanor.* I think it is
 “impossible to doubt that *such is the practice there,*
 “*especially as it is not suggested on the other side that*
 “*the practice is otherwise;* and, therefore, I must
 “take it that, if this application was made at
 “Westminster Hall, it would be granted. The
 “common law of England is the common law of
 “Ireland, where the latter is not altered by sta-
 “tute; and I think that should be relied on rather

“ than any unascertained and unpublished practice
“ here.”

Upon this point it may be desirable to cite the authority of Darcy, an Irish lawyer of great eminence, who was chosen prolocutor in the conference between the Irish Lords and Commons, to explain the reasons of the celebrated questions proposed to the judges in that country in 1641, and to urge the insufficiency of the answers which had been returned by the judges. The argument which Darcy addressed to the conference was ordered by the House of Commons to be printed.* In the course of it† he referred to a case in the Year Books, Pasch. 18 Jac., upon a question as to the power of the Queen's Bench in Ireland to change the common-law practice upon the subject of pleading. In reference to this case Darcy observes that *no course of practice in the Queen's Bench in Ireland can alter the law, and that a declaration therefore by the Irish judges contrary to the law of England was void*. The decision of the Irish Court was reversed, and the Chief Justice of the Queen's Bench in England, the predecessor of Lord Denman, said that if they did not in Ireland know how to proceed according to the common law they must learn it. “ And so,” says Darcy, “ I conclude that “ the answer of the judges to the question is insuf-

* We cite from a copy printed by Thomas Bourke, Waterford, 1643, and reprinted in Dublin in 1764.

† Page 74, 75.

"ficient." He afterwards observes, "Innovations in law creep in slily and slowly, pleading in the end a saucy and usurped legitimacy by untrolled prescription."

"The contest," says Leland, "was closed by a solemn determination of the House of Commons on every separate article in which the rights of Irish subjects were stated and affirmed with strength and precision, and all the powers assumed by the late administration (that of Strafford), all irregular and illegal practices introduced by public confusion and sanctified by custom, were condemned explicitly and severely." The whole proceedings concluded by *an impeachment of the Chancellor, the Chief Justice, and the other persons who had been instrumental in causing the opinions in question to be given.**

* Before we finally take our leave of this part of the case, it may be desirable to refer to the case of *The Queen v. Gordon*, which was the principal authority relied upon by the Attorney-General, in opposing the application for a list of the witnesses. As the case is short, it is copied *verbatim*, from vol. xii. of the *Law Journal Reports*, New Series, *Magistrates' Cases*, 84. The report is in the following words:—

"THE QUEEN AGAINST GORDON AND OTHERS.

"W. H. Watson applied for a rule, calling upon the *prosecutor* to show cause why he should not deliver to the defendant, Gordon, *the additions and places of residence* of several witnesses named on the back of the indictment which had been found against the defendants for *a conspiracy*. The affidavit of Gordon stated that *several persons were named on the back of the indictment of whom he had not the slightest knowledge,*

With regard to the plea in abatement we must refer the reader to page 238, *infra*, where that

“and who, as he believed from circumstances mentioned in the affidavit, were witnesses suborned for the purpose of convicting him by perjury.

“Mr. Justice Patteson : I never heard of any application of this kind, although similar difficulties must have occurred before ; nor do I think that the Court has the power to grant the application.—Rule refused.”

Any person acquainted with the nature of the application made, upon the part of Mr. Duffy, will see, by a mere glance at the words which we have marked in italics, that the case of *The Queen v. Gordon* is so far from being an authority for the refusal which has been given by the majority of the Court of Queen’s Bench in Dublin, that it *actually demonstrates that the application ought to have been granted*. The application of Mr. Watson was, that the *prosecutor* of the indictment may be directed to furnish the *additions and residences* of several of the witnesses whose names were on the back of the bill ; *but who were sworn to be personally unknown to the defendant*. The application of Mr. Duffy was, that the *officer of the court* should give a list of the *names only* of the witnesses. Gordon was so far from wanting a list of the names, that his *affidavit actually stated that he had it already*. It was *because* he had the list of the names that he was in a *condition* to make the application for the addresses. If Gordon had not a copy of the list—if he had not the information which was vainly applied for by Duffy—he could not have sworn that the names were those of persons who were to him altogether unknown. The application of Gordon was for the *addresses and residences*, which *never appear* upon the bill. The application of Duffy was for the *names*, which *invariably do*. The application of Gordon was, that the Court would compel the *prosecutor, over whom it had no direct or immediate control*, to give information, which the prosecutor himself, in the ordinary course of business, had a right to withhold. The application of Duffy was, that the Court would command *its own officer* to furnish to the accused party the *names of wit-*

matter is treated at length in reference to the judgment of the English Judges upon the point.

We come, in the next place, to the challenge to the array — a subject of the most transcendent importance, which has been treated in the House of Lords, by Lord Denman, in so masterly, so dignified, and so overpowering a manner, that we should be guilty of the most presumptuous folly if we thought it possible for us to add any force to an argument which has annihilated all opposition and even all doubt upon the subject, and which exhibits every admirable quality which the noblest sentiments and greatest abilities could collect within the limits of such a composition. It is unnecessary to introduce this luminous judgment by any antecedent statement of the facts, out of which arose, as they are all, as far as they are material to the decision, most perspicuously stated by the noble and learned Lord himself. The Lord Chancellor, having moved that the judgment of the Queen's Bench be confirmed, and Lord Brougham having seconded the motion,

nesses against him from the back of the act of accusation, where they appeared as a matter of course."

Such is the authority upon which Mr. O'Connell was read a list of the witnesses against him. Such the very comical analogies upon which justice is administered in Courts, the endeavour to bring which into contempt is an indictable misdemeanour!

Lord Denman rose and said,—

MY LORDS,

IN considering the important questions which are involved in the case now before your Lordships, it appears to me convenient to advert in the first place to that which has been last argued by my noble and learned friend who has just sat down. I mean the objection to the judgment given by the Court below, allowing the demurrer to the challenge to the array. I am induced to begin with this subject, not only because it is preliminary in the course of the proceedings, but because I think it is important, *to a degree which does not admit of exaggeration*, to the administration of justice throughout the United Kingdom; and that, *if it is possible that such a practice as that which has taken place in the present instance should be allowed to pass without a remedy (and no other remedy has been suggested), trial by jury itself, instead of being a security to persons who are accused, will be a DELUSION, A MOCKERY, AND A SNARE.*

The traversers have challenged the array, on account of the *fraudulent omission* of sixty names from the list of jurors of the county of the city of Dublin. The *Attorney General demurs* to that challenge, *admitting* thereby that *that fact has taken place*. It appears to me that that challenge ought to have been allowed: that was the opinion

of one of the learned judges of the Court of Queen's Bench in Dublin; an opinion stated by him with the diffidence which becomes one who differs from his brethren, but at the same time stated with firmness and perspicuity, and for reasons which, I venture to think with great confidence, *received no kind of answer from the learned judges who formed the majority of that Court.* Speaking with the same diffidence, I disagree with the opinion which then prevailed. I think that the principle laid down in that opinion is not correct. I think that the principle of challenge to the array is not confined to the narrow issue, whether the sheriff has done wrong, but involves that larger question, whether the party has had the security of *trial by a lawful jury of his country.*

When the judges are consulted by this House upon any case submitted to them, it is not usual for such judges as have the honour of a seat in your Lordships' House to attend their consultation; but I was so much *struck with the IMMENSE IMPORTANCE of this present question,* and so entirely unconvinced by the reasoning of the learned judges in Dublin, that I felt a strong desire to ensure the benefit of a full discussion of that point, and I accordingly wrote to my brother Coleridge, several weeks ago, thinking that he would attend that consultation, and would submit that point to the learned judges. Most unfortunately, however, he

was prevented by illness from leaving his room, but he wrote his opinion upon the whole subject; sending one copy of it to the Lord Chief Justice, and another to myself.

“Taking,” says he, “the facts from the challenge of one of the traversers, and dismissing all other knowledge, *it must be admitted*, that the recorder has sent no general list, as required by the statute, to the sheriff; that by some persons unknown *a spurious list* has been transmitted, omitting the names of many qualified special jurors; *that this has been done FRAUDULENTLY, with intent to PREJUDICE HIM UPON HIS TRIAL; that from THAT SPURIOUS LIST the jurors’ book and special jurors’ list have been made, and the present array selected*; and that *the traverser himself is wholly unparticipant in this fraud, and protested against the array being constituted from the list so framed. Here,*” he proceeds, “*is a CONFESSED and SERIOUS WRONG; and the only question is, whether a challenge to the array be the proper remedy.* It is said, first, that the sheriff is not in default; and, secondly, that if the challenge be allowed, no better materials can be found for the array, for the book now formed is by law the book from which any other jury must be selected. With great deference, I submit that neither of these is an answer. Suppose at common law a challenge to the array,”—

and then he puts a particular case, in which the sheriff may have made an imperfect array, and yet not have been guilty of any default at all; and he says, "yet I apprehend *the array would have been quashed*. So here, the sheriff may not be in "default, but still, if the materials for a jury have "an inherent defect in them, the defendants are "not to suffer, but the challenge ought to be "allowed." Then he answers the second argument by observing, "The only consequence is, that the "trial may remain untaken;" and he expresses in strong language his own opinion, that *far better it were that NO TRIAL should be taken under those circumstances* than that it should be taken subject to the HEAVY SUSPICION *which these facts MUST involve*. "That the fraud *is not charged upon the prosecutor* "is, in a criminal question, *quite immaterial*."

On Monday, I found upon my table, on my return home, another letter from my brother Coleridge, written the day before. I had stated to him my general views upon this subject, and in this second letter, after *repeating what he had before said*, that he thought the argument in favour of overruling the demurrer was *too technical for the decision of a great constitutional question*, and stating again the view he took of the balance of conveniences, he says this,—the note is written by his son, as he himself unfortunately is not at present able to write,—“He is much struck by what

“you have written on the question of challenge, and at present, like your Lordship, awaits the *better arguments that are to be adduced* on the other side.”

Now I have a right to state, that I do not stand in the unfortunate position of being alone among the judges, in not thinking that *any thing may be done with any panel* out of which a jury may be drawn, and that there is *no redress for the injury* which may be so inflicted. I venture also to think, as I believe my learned brother Coleridge will think, *those better arguments have not yet been adduced.*

My Lords, the next point is—that upon which both my noble and learned friends have proceeded, namely, that the principle of a challenge to the array is solely for unindifferency or misconduct on the part of the sheriff. The judgment that I have formed, and in which my brother Coleridge states very clearly his agreement, upon the present state of the law is this: that that which was the single duty of the sheriff in former times—to collect the names, to determine who were fit to be the jury, and afterwards to enter them on the panel,—that all those duties, which belonged to the sheriff alone, by the late act of parliament are divided in Ireland between the tax collectors, in the first place, the quarter sessions, that is, on the present occasion, the recorder of Dublin, in the second place, and

the sheriff, in the third place. The ground of challenge to this array was, that after the recorder had exercised his judicial functions, after he had determined, "This shall be the list for the county of the city of Dublin for the ensuing year," somebody else had said, "This shall not be the list; *that* is the list, and that shall be taken, and that shall become the jurors' book." The handing over the perfect list by the recorder to the sheriff is a ministerial act, but that ministerial act has been imperfectly, or rather not at all, performed. The challengers say, "You have deprived your own judicial act, which has been properly performed, of the weight of authority to which it was entitled; you yourself have handed over a list which has made the book imperfect, and therefore we contend that that is no book."

My Lords, I cannot help believing that if that view of the case, which my brother Coleridge states far more forcibly than I can do, had been presented to the learned judges at their consultation they would have thought it an argument at least worthy of consideration. I think they would not have held it sufficient to say in answer, "We find in Lord Coke that it is only in respect of a default by the sheriff that a challenge can be made." The sheriff was then the only officer entrusted with the return of juries, except the bailiff of a franchise, who is an officer strictly analogous. Then who

is the returning officer at present? Why the recorder is the returning officer for this purpose; and, in my opinion, the recorder, though without the slightest imputation upon his motives, which is disclaimed by all, was guilty of a default when he handed over to the sheriff, as the list to make the jurors' book, that which is not the list required by law, and with respect to which the recorder himself had declared that that shall not be the list, but that another shall. He indeed is free from all suspicion, but he has power to indulge the grossest partiality; and if he were justly suspected of it, the general argument would leave the defendant without any protection against its effect.

I also differ from him and from my noble and learned friends who have addressed you this morning in what they have stated as to the consequences which are likely to ensue. The learned Lord Chief Justice says, "No object or advantage could have been gained if the challenge had been allowed; for, if the challenge had been allowed, the jury process would have been directed to some other officer." Now there I venture to think that there is a mistake. The default is not that of the sheriff, and therefore the duty of making the return would not have been taken from the sheriff. The default is either in the recorder, or in the clerk of the peace who acts for the recorder, and who sends to the sheriff an incorrect list. There would, there-

fore, be no reason whatever for depriving the sheriff of his right to return a second jury if the first were set aside on this objection. A *venire facias de novo* might now issue, if this were the only objection; and at this very moment the book may be found perfect, notwithstanding the mutilation that it underwent in the mean time, or circumstances may arise to deprive these defendants of the right of challenge. What may occur in the course of pleading upon any future challenge to the array I know not, and have no right to conjecture.

The act of parliament expressly provides for the want of the jurors' book being returned. My noble and learned friend on the woolsack meets that by saying, "Here is a book returned;" but what is the book returned? The act of parliament requires that a book shall be returned which is *correctly* made up from the list; but the book which has been returned is a book *incorrectly* made up from the list. It is said on the one hand, "What! if there "is a single defect, is that to vitiate the whole?" And there I think the learned Lord Chief Justice has fallen into a mistake, which probably would have been corrected if this opinion, proceeding from so humble an individual as myself, had been thought worthy of discussion at their meeting and of a more specific answer here. He says, "If in England, "through accident, carelessness, or design, a single "name had been omitted in the list delivered to the

“clerk of the peace, according to the argument the whole book would have been vitiated.” I beg leave to question that altogether, because all that is done previously to the decision of the quarter sessions is referred to that decision; that decision is in itself judicial, and makes the book from which I say that the parties had a right to have their jury selected.

When this argument, to which great force was given in Ireland, was stated at the bar in this House, the *reductio ad absurdum* was encountered by an opposite one of much greater extent; for the argument was, “If I am unreasonable, and if the consequence is very inconvenient of saying that the omission of a single name shall vitiate the whole book, and make it a different book, what is the effect of omitting sixty names?—what is the effect of omitting 600 names?—because *either of those is equally beyond the reach of question, unless this mode of questioning is to prevail.*” My Lords, I admit the inconvenience may be very great upon a single occasion, that parties shall not be tried out of any book that the sheriff has received. But let me here observe also by the way, that the decision in the case of *The Queen v. O’Connell* is no decision upon any other case. If the other parties who have issues to be tried are satisfied with the jury-book as they find it, we may be sure that they will not challenge; but if they do, and if a true jury-book has not been returned for that year, the law

itself provides that the former jury-book shall be resorted to. And this is the law of England, as well as the law of Ireland, which follows it as closely as the different circumstances of the two countries will permit. My Lords, my learned brother the Lord Chief Justice supposes that the omission of one name from the unrevised lists would, on my argument, destroy the array. With great submission I think I have shown the contrary, and that probably no inconvenience would arise from holding it to be vitiated by the fraudulent abstraction of many names after the lists have been adjudged upon and signed. *I humbly ask, what balance is there between the two sets of inconvenient consequences?* Is it not right to hold the public officer to the strict and faithful discharge of his easy duty? Can any thing be more wrong than that he should enjoy full licence to tamper with those sacred documents according to his pleasure?

Now, my Lords, what follows appears to me to be of the very highest importance. *That there may be the greatest wrong and injury committed by this very omission of names from the list is UNIVERSALLY ACKNOWLEDGED.* And the Chief Justice says, "that there *must be some mode of relief* for "an injury occasioned by such non-observance of "the directions of an act of parliament *is undeniable.*" So all the judges in Ireland *still more emphatically assert.* So says my noble and learned

friend on the woolsack. So says my noble and learned friend who has just addressed your Lordships. What then is the mode of relief?

My noble and learned friend on the woolsack did certainly raise my expectations to a very high pitch upon this subject. In one part of his argument he said, "*The party is not without a remedy ; the party can set himself right. There may have been a great error, a great injury ; but there is a correction for that error, a redress for that injury ; there is a way to prevent the injustice of such a trial as the law never contemplated and would not have endured.*" Then I wanted to hear from that high authority, *what is that remedy? — what is that redress? — and what is that mode of preventing one of Her Majesty's subjects from being tried by such a jury as the law never provided for him?* "Oh," says my noble and learned friend, "you must excuse me there. I shall put off telling you what the remedy is till *some future occasion ;*" *as if any occasion could more pressingly require the statement.*

When my Lord Chief Justice and the other learned judges in England, and the learned judges in Ireland, and my Lord Chancellor, can inform us of NO REMEDY WHATEVER against this, which is admitted to be possibly the GREATEST WRONG, and productive of the GREATEST CONFUSION and interference WHICH IT IS POSSIBLE TO CONTEMPLATE, with the sanc-

tity of the law and the SECURITY OF THE SUBJECT, I shall venture to go farther and declare, that, if this right of challenge is gone, the law provides no remedy ; but I will not believe that the law can have placed its subjects in such a situation. Unless I see the old and well-known constitutional practice of challenge to the array, founded on the principle of the array being itself incorrect and injurious to the party, — unless I see that ancient process directly repealed by act of parliament, I will not believe that that process does not still exist, and that that remedy is not still preserved to the subject. The absence of all OTHER remedy in a case of such IMMENSE IMPORTANCE is to me demonstrative proof that that old remedy exists — that the objection has been well taken — that the challenge ought to have been allowed — and that the trial has ERRONEOUSLY proceeded.

My Lords, I shall keep my promise, and spare your Lordships the hearing of much which I have collected. But there is one thing too remarkable to be overlooked. In that short passage in Lord Coke, which contains the whole of the learning upon this subject (Co. Litt. 156.), he cites a case from the Year Books, which is twice reported, once in the 17th of Edward III., and once, I believe, in the 20th of Edward III., though I think Mr. Hill quoted it as the 50th. I could not find it there, but I found it in the 20th, and I have

it copied before me. The sheriff returned a list, which the bailiff of the franchise ought to have returned; that was held to be wrong *primâ facie*, because it deprived the party of his challenge against the bailiff individually. But then it was argued, "Oh, but there are good names enough returned by the sheriff to ensure the party a fair trial;" *exactly the argument which appears to have succeeded in Dublin.* But the Court held, in the time of Edward the Third, that as the array was one entire indivisible thing, one error would vitiate the whole, and the whole was accordingly set aside. In that very case the sheriff was charged with unindifferency, the question of his unindifferency was tried, he was acquitted upon that charge; and *yet the fact of his having done, though not with any corrupt or partial intention, that which gave a different jury was deemed a default sufficient to set aside the whole proceeding.*

My Lords, I must not leave this subject without observing yet further upon the want of other remedy. It was suggested in the course of the argument here by some learned person, that an application might be made to the Court. What! are the Queen's subjects to apply to the *discretion of the Court to have a LAWFUL JURY TO TRY THEM for their LIVES, for their LIBERTIES, for their MOST IMPORTANT INTERESTS?* *It is to be a thing upon motion, and upon written deposition, the party accused always swearing last, and after*

all, the matter referred to the discretion of the Court, the decision subject to no appeal? But in this case I find the judges stating that there *was* such a motion. The motion *was refused*. *Upon what ground I do not know*, for I have read nothing of these proceedings but what I have seen in the papers printed for our use. But, as I understand the facts, I must take the liberty of saying, that *it would startle any court in ENGLAND to hear that SUCH A MOTION as that should be REFUSED*. I cannot help thinking that the omission of sixty is considerable enough to affect any party's chance of obtaining a right jury. The number seems to me to be a great proportion. It is obviously by no means impossible that, if those sixty names had appeared in the panel, *the whole jury might have been drawn from those names*; and who can tell me that *the EFFECT of the evidence upon the minds of the jury might not have been ENTIRELY DIFFERENT if they had consisted of those gentlemen?* That, however, is a subject upon which I think I am not at liberty to enter. I consider that it cannot be incumbent upon any person to prove any other particular injury than simply and solely that one of Her Majesty's subjects put upon his trial *has not had the security, which is provided for him by law*, that that trial shall be a fair one.

If this be otherwise, — if the old redress is abrogated and no new provided, — that improved law, which was intended to place the construction of

juries beyond all abuse and all suspicion, would have the effect of *securing success to the worst manœuvres, and of unsettling the public confidence in the most important functions of justice.*

The great object of improving the mode of appointing juries was undoubtedly to purify the practice, and prevent all tampering, and suspicion of tampering, with the construction of those important bodies. But if the present doubt is well founded, *the most impure proceeding might pass unquestioned, the most corrupt packing of juries might prevail.* For though in the present instance no suspicion is felt as to the motives, this argument goes the length of *depriving the parties of all redress, however criminal the design may have been.*

From admitting such challenge for the cause stated in the present case, great inconvenience, is however, predicted. The objection being to the book of jurors for the current year, is supposed to prevent the summoning any good jury for that year. The Chief Justice observed, "This is not the case of *Reg. v. O'Connell* alone ; it is the case of all parties who have issues to be tried during the period for which the book is to be in force. The Court cannot set aside that array without setting aside the book itself from which all juries must come."

Taking the supposed inconvenience at the highest, what are we to say of *subjecting parties, through any misconduct, negligence, or default in official persons, to a trial by a different jury from*

that which the law provides for them. But the inconvenience imagined is a chimera, if the objection be of such a nature as to prove that the book called the Jurors' Book appears to have no title to be so styled. And this appears to me to be its true result ; for if the sheriff has not received the book described and required by the Act, the Jury Acts of both countries have met this inconvenience by express enactment. And if this be considered doubtful, still it may be observed, that the supposition of the Court's setting aside *the book* generally, when they give effect to a challenge of the array in a particular case, by reason of the imperfection of such book, can hardly be maintained. Other parties may not challenge, notwithstanding the defect, and the book actually sent by the sheriff, if unchallenged, must stand good ; or they might be unable to prove the facts, or might have waived the objection, or be estopped from insisting upon it.

Those who argue against the right of challenge to the array must be content to take up a position ever regarded by our Courts with the utmost jealousy, — that *here is a right which cannot be effectuated, — a wrong without redress. Remedy or redress there is NONE PRETENDED, HOWEVER DEFECTIVE THE PANEL MAY BE, or from whatever cause or motive the defect has arisen,* unless it can be obtained through the old and well-known constitutional proceeding of challenge to the array.

If the law enjoins the recorder to make a general list, composed of lists A, B, and C, and then to select his panel from *that* general list, but he thinks proper to compose his general list from lists A and B only, is this no default? It may be venial, — it may involve less blame to him than to some of his subordinates, and the Court may properly refuse to exercise its power of punishing the officer; but surely *the party who has duly complained of the evil consequence to himself, and his own security for a fair trial, cannot justly have that UNLAWFUL jury forced upon him.*

The complaint is, that the recorder's *judgment*, which is irrevisable and without appeal, *has been set at nought by the FRAUDULENT substitution of another*; that *the stream of justice* has thereby been *obstructed* in its flow, and the administration of the law rendered *essentially different* to the parties traversing *from what it ought to have been.*

Another objection to this challenge occurred to Mr. Justice Crampton, — that the panel was spoiled by a stranger. "What is ground of challenge to the array according to law?" asks that learned judge. He answers, "A challenge founded on partiality in the *officers*. You may challenge the return for fraud or mistake in the officer, but fraud in a stranger will not give the Court jurisdiction." I certainly had thought that a fraudulent interference with the process of the Court would have given jurisdiction over the offender's

person, and, still more clearly, over the document which he had mutilated.* If not, it should seem that a stranger, striking out of the reduced panel of twenty-four any number of names he chose, and introducing the names of others, might impose this *jury of his own fabrication* as the twelve men appointed by law for the trial. But if the stranger's act was adopted by the sheriff, or any other officer entrusted to return the jury, this would be the act of such officer, in conformity to what is laid down by Lord Coke, in 1 Inst. 156., from an authority in the Year Books.

For my part, I do not understand how the right to challenge the array can rest on any other principle than the *right of Her Majesty's subjects to have their interests decided by juries duly constituted according to law*. That jury, which was returned from partiality, or imperfect through any default in the sheriff, was not so constituted. On that officer, and on the bailiffs of franchises who performed analogous functions, the whole duty was cast in ancient times. By the recent act it is divided with other officers; but if the panel is rendered *essentially imperfect* by any one of these,

* "Fraud is an extrinsic collateral act, which vitiates the "most solemn proceedings of courts of justice. Lord Coke says "that it avoids all judicial acts, ecclesiastical or temporal."—Unanimous opinion of the Judges delivered by Lord Chief Justice de Grey in the House of Lords in the Duchess of Kingston's case, *Smith's Lead. Ca.*, vol. ii. p. 431. — [Note by the Editor of *Lord Denman's Judgment*.]

when not exercising a judicial capacity, *the subject loses the protection which the law would have afforded him*, and the principle of challenge to the array applies.

During the discussion, I heard a suggestion thrown out to meet the argument arising from the absence of all other remedy. The party was said to be at liberty to apply by motion to the Court. I confess that I am at a loss to find it just or reasonable to strip a party of a *well-known constitutional process*, fully adequate to correct the wrong and prevent the mischief, and refer him to the *discretion of any Court*, exercised on facts brought before it in the unsatisfactory form of written depositions, where the *accused officer has the benefit of swearing last*, when questions of fact would be withdrawn from the tribunal established for settling them, and the law would be laid down without appeal.

In the present case, however, we collect, that such application was *actually made, and refused*. I must conjecture, that the facts *now admitted on demurrer were NOT well proved by the affidavits; for IF THEY WERE TAKEN TO BE TRUE, I can HARDLY CONCEIVE A STRONGER CASE FOR SETTING ASIDE A JURY PANEL than that which exists in the present case.**

* At the moment when the Attorney General demurred to the plea in abatement, the Recorder, and every other officer concerned in the manufacture of the lists, were actually present

It is said that "no particular injury is stated" in the challenge. But none can be stated, nor, if stated, could be proved. There are no materials on which the judgment of the triors or of the Court

in court, and could of course have been examined upon the facts of the case if the law officers had taken issue upon the plea. Upon the part of the defendants, the matters alleged in the plea are verified by several affidavits : upon the part of the prosecution, the facts so alleged are confessed upon the record. The law officers, in the mean time, endeavour to contend that their own confession, and the affidavits of the defendants, are not sufficient to prove the actual truth of the allegations. But they themselves absolutely prevent the possibility of deciding the question of such truth by any form of investigation to be applied to the matters of fact, although the officers who alone could give a full and authentic account of the transaction must be supposed to be all under the influence of the Crown ; and although they were all actually present in court, in consequence of subpœnas issued by the defendants at the time when the Attorney General, instead of taking issue upon the facts, tendered a demurrer to the plea upon a technical defect in its construction, and so rendered it impossible for the defendants to establish the truth of the allegations in the challenge by any species of judicial inquiry. This, however, is not very material, as, whatever may be the effect of the admission upon the record, the fact is notorious and undoubted, that the jury list was illegally concocted by *somebody*, and that the effect of the concoction, taken in conjunction with what occurred in the Crown Office upon the striking was, that Mr. O'Connell, a Catholic and a Repealer, was tried by a jury from which every Catholic and Repealer had been struck off by the Crown, and that his jury consisted of men almost every one of whom was so notoriously and violently opposed to him in politics and religion that he would have thought it a matter of discretion to challenge almost each individual of the twelve if he had the right to do so in law. — [*Note by the Author of the present Review.*]

could be exercised. The whole subject lies beyond the reach of human speculation. *But as long as men differ in their opinions, understandings, and feelings, and so long as these influence their decision on disputed points of morality, expediency, and general policy, so long must it be at least uncertain whether* THE EXTRUSION *of a tolerably LARGE PROPORTION of persons from the body to which they belong may not materially affect the character of its general composition, and vary the chances of their arriving at such or such a conclusion. Here, if the true list had been entered in the sheriff's book, it might have happened that NOT ONE OF the gentlemen who tried this case would have been suffered to enter the jury box. The jury might have consisted altogether of individuals comprised in the omitted sixty, and might have brought to the inquiry such sentiments and habits of thinking as must have ensured the acquittal of all the persons under accusation.**

* The sagacity, justice, and profound sense of these observations have been universally admitted by "the learned frequenters of Westminster Hall" without any exception. When the judgment was, however, delivered, it was little supposed that, within so short a period, so extraordinary a confirmation would be afforded in fact of the accuracy of the general theory of Lord Denman's judgment upon this point as is exhibited by the following occurrence which took place at the annual revision of the jury list in 1844, one year after the transaction which is the subject of the plea in abatement:—

"Edward Clarke, Esq., of Stephen's Green, claimed exemption from serving, on the ground of his being an attorney.

To disclaim any thing like an opinion that this would have happened, or a suspicion of the fair-

“ Mr. Clements. Were you not objected to *on that ground last year?* I was.

“ Mr. Clements. And did you not then *insist upon being put on?* I did.

“ Mr. Clements. You succeeded? Yes.

“ Mr. Clements. *You were on O'Connell's jury?* Yes.

“ Mr. Clements. Is it to your professional skill the public are indebted for the special pleading on the issue paper? I *cannot say.*

“ Mr. Clements. Now, sir, may I ask you wherefore it is that you, a retired attorney, seek for exemption now, while under identically similar circumstances last year you *pressed and insisted upon being on the panel?*

“ Mr. Clarke. The fact of it is, I got quite enough of it.

“ The Recorder ruled that, not being an attorney actually practising, his name should remain on the list.”

The indictment against Mr. O'Connell was found by the grand jury upon the 8th November, 1843. The revision of the jury list by the Recorder was commenced upon the 14th of the same month, and the trial began upon the second day of the ensuing term. Mr. Edward Clarke was the second person who answered to his name in court, upon the calling of the special jury, and exercised, in all probability, some considerable influence over his fellows as to the substance of the conclusion at which they arrived, and the form in which they expressed it. Mr. Clarke is a decided political and religious opponent of Mr. O'Connell, and as soon as the prosecution was commenced he insists upon his right to be placed upon the jury list, notwithstanding that he was objected to upon the *very ground upon which he now claims to be exempted from the necessity of serving for the future.* He claims, in 1844, the privilege of not being called upon to take his share in general administration of justice, having, in 1843, insisted upon his right to perform the special function of deciding upon the guilt or innocence of his political opponent, about to be tried for a political offence. Can any

ness of those by whom the cause was tried, cannot be necessary. The want of all opportunity and power of arriving at any conclusion upon such a matter drives me to say, that THERE IS *no alternative between a list duly formed according to the act and one not so formed*—*no middle course between what is UNLAWFUL and what is RIGHT*—*no equivalent or substitute for that security for a FAIR TRIAL which the law has CAREFULLY PROVIDED.*

The strictness which would vitiate the whole for a single omission was not formerly considered as a *reductio ad absurdum*, but was acted upon as a *ruling principle*. Nor will this jealousy appear excessive, if we weigh the opposite inconveniences. The question, rather tauntingly thrown out, “Will you set aside the whole panel because one name has been omitted?” is surely well enough rebutted by the other question, “Will you hold it good, though nine-tenths should be omitted?” *There is no great inconvenience in exacting perfect fidelity and accuracy from ministerial officers who have to perform an easy duty of INCALCULABLE IMPORTANCE to the public.* Glance at the

human being, however charitable, entertain the slightest possible doubt about the determination with which Mr. Clarke entered the jury-box to try Mr. O'Connell? Can any person hesitate to believe that other jurors entered the same box with the same purpose? Can any body entertain any reasonable doubt that the jury which tried Mr. O'Connell were either predisposed or predetermined to convict him, and that the trial was a mere formality, and the conviction a matter of course? — [*Note by the Author of the present Publication.*]

inconvenience of dispensing with those qualities in their returns. At best, according to the learned judges, the Court must task itself with the inquiry, whether the number to which a panel may have been improperly reduced was large enough to promise a fair trial, under all the varying circumstances of each particular case, without any means whatever of ascertaining the fact. But the *negligence thus sanctioned and encouraged might be ASSUMED AS THE CLOAK OF FRAUD, and would infallibly incur the suspicion, and fill the minds of the people with all the distrust and discontent which, we can all remember, to have hung upon the special jury system but a few years back.*

Farther, it was objected that the making up the lists without these sixty names, and the omission of them from the special jury list, is not averred to have been without the consent of the challengers, but only the *fraudulent omission* of them from the paper purporting to be the general list, and the array of the panel from that paper. But that twofold averment, with the fact that the special jury list was made from those materials, appears to me sufficient; and when this is averred to be done *to the wrong and prejudice of the defendants*, I cannot think that there is *any presumption of their privity* requiring to be rebutted by them in pleading.

One more remark was, that on the challenge, as pleaded, the Court could give no award—princi-

pally, as I understood, because there is no ground for punishing the sheriff or other officer. But I apprehend that this notion has been already shown to be a fallacy, and the same award must be pronounced as would have been pronounced under the old law, in respect to the party challenging, whose prayer is that *the bad array may be set aside*, not that the officer should be punished. If a *venire facias de novo* could be issued, the lists signed and purloined may possibly be by this time faithfully copied and restored, and may compose a good jurors' book ; or if, for want of them, there is none for 1844, recourse may be had to that of the former year. A challenge may not be taken, or the facts on which it is founded may possibly admit of some answer. *But if from neglect of duty in the officers, or any of them, it should still remain impossible to bring a good jury into the box, I cannot see that that ought to COMPEL the accused to submit to be tried by a BAD one.*

Thus have I set down what occurred to me from recollection and my notes of the argument in the House of Lords. I have since that time again read over the judgments on this point given at Dublin, and am much fortified in my own views by Mr. Justice Perrin's concurrence and reasoning, while I cannot feel that there is *the least weight in the opposite argument of the majority of the judges.*

If I am asked how many omissions and interpolations will suffice to vitiate a return, I might

perhaps decline the question as irrelevant, because the number actually omitted is, at all events, so considerable as to disturb the identity of the return. But I would decline to answer it for another reason—the impossibility of tracing the operation of the faulty proceeding. *The truth may be that the whole jury of twelve would have come out of the rejected sixty; or the truth may be, when one only is excluded, that that one entering the jury box as one of the twelve to try the issues would, by his influence with the other eleven, cause a different verdict.* But such truth can never be established by evidence, nor can it be made the subject of any rational speculation. The law, regardless of the calculations which may be formed in various quarters upon these doubtful probabilities, affords a certain protection to all whose interests are to depend on the verdicts of juries, by cautiously providing the manner in which these are to be composed; and if *THIS protection is not secured, the parties have NONE.*"

It would be quite superfluous to enter into any detailed examination of the evidence which was given at the trial, as we have taken the result, effect, and value of it all through from the statements which were made by the law officers themselves. As the reader may, however, desire to see a compendious representation of the actual features, character, and conduct of one of the monster meetings, we extract

from the testimony* the account which was given of the largest of them all,—at which

“Behemoth, biggest-born of Earth, upheaved
His vastness,”—

by a police constable, who was despatched from the city of Cork, some sixty or seventy miles, for the purpose of attending it.

“*James Healy, a Police-Constable, cross-examined*
“*by Mr. M'Donogh.*

“You heard no expression among the people except those you stated? No. [The expressions which the witness had stated immediately before were ‘God save the Queen,’ or ‘The Queen, God ‘ ‘ bless her.’ ‘Repeal and Old Ireland,’ or ‘ words “ ‘ to that effect.’]†

“You mixed among the crowd very much that day in the discharge of your duty? Very much.

“And very minutely and attentively observed what was going on? Very much so.

“You listened attentively to what was said? I did.

“You mingled with the groups of people, and attended to what they were saying? Anything I could see or hear I noticed it.

“And all you did see or hear them say or do

* Flan., 232, 233.

† The first resolution adopted at the meeting was one of loyalty to the Throne, and a determination to uphold the prerogative of the Crown. (a)

(a) Ar. & Trev. 369.

“ was to shout for Repeal and Old Ireland ? That’s
“ all.

“ Although you were there from eight o’clock
“ in the morning until next morning ? Yes ; I
“ was there the evening before, and all that day,
“ and up to eleven o’clock at night.

“ And you were sent specially from Cork for
“ that purpose ; I presume it was because you
“ were a stranger that you were selected ? That
“ may have been the reason, but I cannot say.

“ Now, as we have what you heard, I want what
“ you saw. Was not that a very peaceable as-
“ sembly ? Indeed it was very much so as far as I
“ saw.

“ *No riot or breach of the peace ? All was very*
“ *quiet in that respect. There was NOTHING WRONG*
“ *THAT I COULD EITHER SEE OR ASCERTAIN.*

“ When you told the Attorney-General that par-
“ ties remained there at night, did you mean to
“ convey that they remained for the banquet ?
“ Persons remained in tents and places enjoying
“ themselves.

“ In peace and quiet ? Yes, in peace and quiet
“ as far as I could see.

“ You stated that you saw bands coming from
“ the direction of Carlow and Kilkenny. Do you
“ know if these were temperance bands ? I think
“ they were.

“ Now as you are from the south of Ireland,

“ you must have seen several of Father Mathew’s
 “ processions? I did, a great many of them.

“ There were temperance bands at those pro-
 “ cessions? There were.

“ How many bands have you seen at one of
 “ them? More than there were at Mullaghmast;
 “ a good many more.

“ How many? I counted forty-five bands at one
 “ time at the great temperance procession in Cork
 “ on Easter Monday.

“ And about how many persons do you suppose
 “ were there? I should suppose about 300,000.

“ Were the temperance bands who were with that
 “ meeting of 300,000 persons in uniform? Yes,
 “ some of them.

“ Had they flags or banners? A very few, and
 “ they were small ones.

“ I presume they bore inscriptions? They did,
 “ but they were all connected with the temperance
 “ movement.

“ Those processions are, I believe, common in the
 “ south of Ireland? Very common.

“ Have you been long in the constabulary?
 “ Nearly twelve years.

“ Have the people improved in their habits in
 “ consequence of the temperance movement? I
 “ should say they have.

“ Very much so? (After a pause)—In point of
 “ drunkenness there is a great improvement among
 “ the people (laughter).

“ Were you at the great procession at Nenagh ?

“ I was not.

“ When the bands were coming to the ground
“ from the direction of Carlow and Kilkenny, how
“ did they come? They appeared to be very wild,
“ and tossed all before them.

“ Were you one of the people that they tossed
“ before them? I was.

“ *But was not all that from high fun? It was.*

“ Mr. O’Connell (to Mr. M’Donogh)—Ask him
did they injure any body.

“ Did they injure any body? *Not that I could
“ see, except to knock down a couple of gingerbread
“ stalls.*

“ Were there many persons there, disposing of
“ these things? Several were there.

“ Many people selling gingerbread? Yes, and
“ grog and coffee, and other eatables of that sort”
(laughter).

“ Did you know any of the people who sold these
“ papers that you bought one of? No, I did not.

“ They were sold, and not circulated gratui-
“ tously among the people? Yes.

“ You did not perceive any one giving them
“ away for nothing? I did not.

“ I suppose in these large assemblages in the
“ south of Ireland you have frequently seen per-
“ sons hawking about ballads, and selling them?
“ Yes.

“ Do not they usually take advantage of these

" large meetings, and hover about the precincts of them to sell these ballads? I should think so.

" They hover about the outskirts of a meeting, and endeavour to retail these things for profit? Every place where they think they can make sale of them.

" And I believe at assizes, while the judges are sitting in the criminal courts, those ballad singers are generally to be found in the vicinity of the courts? I have seen them there.

" With respect to the persons that had on their hats the words 'O'Connell's police,' I ask you, as a fair and honest man upon your oath, did not those people contribute to the preservation of the peace and order? I saw them exert themselves.

" That is no answer. Did they clear the platform? They may have intended to keep the platform clear, and to keep order about it. Heard a man, named Walsh, give instructions to the people to keep order and quietness about the platform and pavilion.

" Were they peeled wands they had in their hands? The sticks they had were smooth, and very slight.

" They were not pieces of timber? They were pieces of timber.

" Oh! they were of course made of timber, but they were not what you called on your direct examination pieces of timber.

" Attorney-General — That was not what he said.

"Mr. M'Donogh — I beg your pardon, I insist
 "I am right; he called them pieces of timber, and
 "then went on; but it is of no consequence.

"Were you here on the entry of George the
 "Fourth into Dublin? I was not.

"You were at Mullaghmast dinner? I was, but
 "not all the time.

"One of the mottoes, you say, was, 'No *Soxon*
 "(laughter) butchery shall give blood-gout for a
 "'repast?' (loud laughter). Yes.

"There was something better for repast on that
 "occasion, I believe? Some appeared *not to be*
 "'satisfied'; the dinner appeared to be *rather sho*

"You say another motto was, 'Ireland dragged
 "'to the tail of another nation?' That was the
 "purport.

"Mr. M'Donogh — A good heavy load she
 would have, would she not?

"Mr. O'Connell — And a strong tail (laughter).

"Witness — There were private carriages in the
 "procession.

"Did you take down all the mottoes? I did not.

"Why did you not take them down? Because
 "I thought it was no consequence.

"Perfectly harmless? Quite so.

"Not material. Just so.

"Therefore you did not take them? Just so.

"The witness then left the table."

Upon the conduct of the Government in refer-

ence to these assemblies, we entreat the most earnest attention of the reader to the following statement which appeared in the "Morning Chronicle" of June the 10th, 1844. The statement is of the greatest importance in several points of view, and requires no commentary whatever, as it most perspicuously expresses its own meaning.

" The conduct of the Government upon the subject of the Repeal agitation appears to have equally puzzled their adherents and their opponents. In the speculations which we have ourselves occasionally made upon the point, we have always been willing to admit that the Ministry, in allowing the progress of the monster meetings, may have been influenced by a desire to avoid collision, or a hope that some lucky circumstance would eventually bring those immense assemblies to a conclusion. We were unwilling to admit the supposition that *the Ministerial connivance was only a treacherous watchfulness, which hoped for some accidental occurrence of outrage, as a pretence for crushing the expression of public opinion at meetings which were not alleged to be illegal in themselves, even upon the very face of that indictment where they were laid as overt acts of illegality.* This disposition upon our part to disbelieve in the existence of treachery in the Government, must, however, now be abandoned, upon the decisive authority of a letter, which we have received from a gentleman whom we know to be a person of high respectability, and who

"has communicated several remarkable details
 "connected with the holding, as well as the 'get-
 "ting-up' of one of the largest of the meetings in
 "question, which took place in *Skibbereen*, in the
 "county of Cork, about the middle of July. Pre-
 "vious to the convening of the general meeting,
 "preparatory ones were held, *at the first of which*
 "*Mr. Brew, a sub-inspector of police and* a very
 "intelligent officer, made his appearance along
 "with a *sergeant of the force*. They were received
 "with marked courtesy, had seats provided for
 "them, and, as the meeting had been sitting some
 "time before they entered the room, *all the*
 "*previous proceedings were detailed to Mr. Brew,*
 "*and the resolutions were shown to him, as well*
 "*as all the other documents; amongst which was a*
 "*detailed plan in writing of the manner in which*
 "*the district committees, about fifteen in number, were*
 "*formed, for the purpose of preparing the several*
 "*districts to furnish respectively their proper quotas*
 "*of men and repeal rent.* This document stated
 "the names of the committee-men in the several
 "districts, and exhibited a *minute and perfect plan*
 "*for the organisation of that very extensive district,*
 "*in such a manner as to secure the attendance of the*
 "*largest possible numbers at the meeting.*

"Upon the breaking up of this preparatory
 "meeting, the committee *addressed a letter to Lord*
 "*Eliot*, stating the fact of the attendance of the
 "police, and of the mode in which they had been

“ received, and stating that, although the com-
 “ mittee *would on no account have uttered one*
 “ *syllable at the meeting and before the people which*
 “ *might have been even by possibility misinterpreted*
 “ *into a condemnation of those in authority, yet that*
 “ the committee did not the less feel the impro-
 “ priety of their intrusion (though their personal
 “ conduct was most proper); and that the com-
 “ mittee begged to inform his Lordship that they
 “ considered such an intrusion (the meeting hav-
 “ ing been held in a room at a hotel) as altogether
 “ unnecessary, &c. ‘Now here, surely,’ says our
 “ correspondent, ‘was the *attention of Government*
 “ ‘*directly attracted to the subject—and what was*
 “ ‘their answer?—a condemnation of the object
 “ ‘of the meeting, or of the means intended to be
 “ ‘used for the accomplishment of its purpose?
 “ ‘*No such thing. No hint, no warning, that the*
 “ ‘intended meeting *would be illegal if held, as an*
 “ ‘*undue exhibition of physical force. Nothing of*
 “ ‘that, by a reply that an investigation into the
 “ ‘circumstances would be instituted.’ That is to
 “ say, *that the Government would inquire into the*
 “ *charge of improper conduct made against the*
 “ *police.*”

“ Mr. Brew attended another much larger pre-
 “ paratory meeting, subsequently to the one already
 “ mentioned, but previous to the reply from Go-
 “ vernment, of which reports and returns were
 “ received from the various districts — a letter

“ from Mr. O’Connell read — *and extensive arrange-*
 “ *ments entered into for an immense cavalcade, &c.,*
 “ *and yet no warning was given to the public by*
 “ *the public authorities. ‘Is it too much to say,’*
 “ *continues our correspondent, ‘that the people*
 “ *‘must naturally have concluded, that what was*
 “ *‘thus known to the Government as in progress of*
 “ *‘being done, and not even hinted at as criminal,*
 “ *‘could not, in reality, be anything but innocent*
 “ *‘when actually performed? Was it a trap? I*
 “ *‘do not say so; but it is hard to punish for acts*
 “ *‘which might by a word have been prevented. The*
 “ *Government had full notice of a monster meet-*
 “ *ing to be held — corresponded with its committee*
 “ *on the subject — not only did not express disap-*
 “ *probation of the object or the means, but impli-*
 “ *edly sanctioned both; and afterwards this same*
 “ *Government prosecuted for those acts as a*
 “ *crime.’*

“ All comment upon this communication is un-
 “ necessary. In our opinion it completely convicts
 “ the Government itself of that conspiracy which
 “ the Government has untruly, and, as we have
 “ always thought, ridiculously imputed to the
 “ Repealers; and we hope that some gentleman in
 “ the House of Commons will require from Lord
 “ Eliot an explanation of the extraordinary circum-
 “ stances which we have stated.

“ If we may judge from the tone of the only
 “ metropolitan morning paper which represents the

“ Ministerial sentiments, we should conclude that a
 “ mere treacherous abandonment of their duty was
 “ not the only charge to which the Cabinet were
 “ liable upon the subject in question, but that they
 “ sought to exasperate the Irish population into a
 “ violation of that peace which the people of that
 “ country seem so resolutely determined to pre-
 “ serve. In the *Morning Herald* of Friday last the
 “ following passages occur:—

“ ‘ As the man of the *priests and the savages*,
 “ ‘ Mr. O’Connell has, amid the concurrent good
 “ ‘ wishes of all the rest of his fellow-subjects
 “ ‘ speeding him to the gibbet, to Australasia, or to
 “ ‘ a dungeon, been able to maintain a high position,
 “ ‘ and to levy exorbitant tributes from men who
 “ ‘ hated and yet pretended to obey him. No
 “ ‘ government dared to attack him, though, in his
 “ ‘ rapacious pursuit of plunder, he threatened the
 “ ‘ security of the empire itself—the feeble Saurins
 “ ‘ and Blackburns quailed before the power of
 “ ‘ the *priests and the savages*—the crafty Plunkets
 “ ‘ and Pigots were only too happy to elude a grap-
 “ ‘ ple with them—and in the person of Mr. O’Con-
 “ ‘ nell the *priests and the savages* really exercised
 “ ‘ the government of Ireland.’

“ We shall not condescend to characterise this
 “ composition, much less to enter into any discussion
 “ with such a person as the writer of it must be.
 “ Our purpose in quoting it is to call the attention
 “ of Sir Robert Peel to the subject, and to ask if

“ these be the means by which he proposes to calm
 “ the indignation of the Irish people, infuriated as
 “ they are by the spectacle of their leader being
 “ incarcerated, after a trial which the highest au-
 “ thorities in this country declare to be illegal, and
 “ upon a charge of which they believe that leader
 “ not to be guilty, and of which he has himself de-
 “ clared upon his solemn oath that he is innocent.
 “ Without pretending to possess any peculiar de-
 “ gree of sagacity, we may safely affirm that such
 “ insults can have no other effect than that of
 “ heightening the existing exasperation, and giving
 “ renewed vigour to an agitation which the Govern-
 “ ment and its organs vainly believe to be weakened,
 “ if not suppressed.”

Can the reader believe that this meeting so held
 not *only by the connivance*, but by what may very
 properly be called *a previous understanding and*
arrangement with the Government itself in Dublin, as
well as with the police authorities of the locality where
the meeting was holden, was included in the Bill of
 Particulars* among the NINETY assemblies at which
 the speeches made, the resolutions PROPOSED or adopted,
 the acts done, the documents read, and the several
 proceedings which took place, were to be given in
 evidence against the defendants in the prosecution.

Before we finally quit this part of the case we
 shall present the reader with the following descrip-
 tion of the actual condition of the defendants be-

* Suprà, p. 38.

fore the trial in respect to the evidence to be adduced for the prosecution. The passage is taken from a joint affidavit by the five attornies for the defence, and is to be found in pp. 33, 34, 35 of the Return which was ordered by the House of Commons on the 19th June, 1844. The mere perusal of it is sufficient to confound the clearest head and to affright the stoutest heart : —

“ And these deponents say, that *even if the prosecution in this cause had been confined to the charges the particulars of which are specified in the said indictment* *, these deponents would not have been able by any possible diligence or activity to have been prepared sooner than next Hilary term to meet those charges, from their numbers, their peculiar character, and the amount and variety of evidence which these deponents are advised, and believe it would be necessary, to offer on the trial of the said defendants in answer to the charges in the said indictment ; but deponents say, that, on the contrary, they have been apprised that it is not intended that said charges shall be so confined, for these deponents say, that having been advised that it was necessary for the defence of the said defendants that they should obtain full particulars of the charges on which it was intended to rely in said prosecution, these deponents respectively caused notice of applications to the court for particulars of such charges

* To the fifty-three printed folio pages of overt acts.

“ to be served on the Crown solicitor on the 11th
 “ of November instant for Tuesday the 14th of
 “ November instant; and these deponents say, that
 “ a paper purporting to be a bill of particulars of
 “ said charges was furnished to these deponents
 “ respectively late on the night of the 13th or early
 “ in the morning of the 14th instant; and these
 “ deponents say, that by such bill of particulars
 “ these deponents were *for the first time apprised,*
 “ *that IN ADDITION to the several matters and things*
 “ *set out in THE SAID INFORMATIONS, and the FIRST*
 “ *COUNT OF SAID INDICTMENT, [the fifty-three pages of*
 “ *large folio print already mentioned], comprising,*
 “ amongst others, the several meetings and speeches
 “ hereinbefore referred to, it is intended by the
 “ Crown to give in evidence in support of the pro-
 “ secution the several speeches made, the several
 “ resolutions moved or adopted, the several acts
 “ done, the letters and documents read, and the
 “ several other proceedings which occurred or
 “ took place at each and every of the several
 “ meetings in said first count specified or re-
 “ ferred to, *and also* any entries of the several
 “ proceedings made by the said defendants or any
 “ of them, or by the directions of them or any
 “ of them, and also the manner and order in
 “ which the persons comprising said several meet-
 “ ings respectively went thereto; *and further,* that
 “ it is by said bill of particulars stated to be *also*
 “ *intended* to give in evidence on the part of the

“ Crown in support of said prosecution the se-
 “ veral speeches made, the resolutions proposed or
 “ adopted, the acts done, the letters and other do-
 “ cuments read, and the several proceedings which
 “ occurred or took place at each of several meetings
 “ in said bill of particulars specified, *amounting in*
 “ *the whole to the number of* FORTY-NINE MEETINGS,
 “ NOT ALLUDED TO OR MENTIONED EITHER IN THE SAID
 “ INFORMATIONS OR THE SAID INDICTMENT ; and say,
 “ that *twenty-four* of said last-mentioned meetings
 “ are alleged to have been held at *divers places*
 “ throughout the country districts of Ireland, and
 “ many of them in *remote places, at great distances*
 “ *from Dublin*, and in particular that several of said
 “ meetings are in said bill of particulars alleged to
 “ have been held, among other places, at Limerick
 “ in the county of Limerick, at Sligo in the county
 “ of Sligo, at Charleville in the county of Cork, at
 “ Cashel in the county of Tipperary, at Ennis in the
 “ county of Clare, at Athlone in the county of Ros-
 “ common and Westmeath, at Skibbereen in the
 “ county of Cork, at the town of Galway, at Tul-
 “ lamore in the King’s County, at Tuam in the
 “ county of Galway, at Maryborough in the
 “ Queen’s County, and at Roscommon in the county
 “ of Roscommon, as by said bill of particulars ; it
 “ *further appears* to be intended to give in evidence
 “ in support of said prosecution the holding of and
 “ all the proceedings and acts of certain assemblies
 “ in said bill of particulars alleged to be styled

“ Courts of Arbitration, and to have been held at
 “ Blakrock and Rathmines in the county of Dublin,
 “ and also in the city of Dublin, and also at Lime-
 “ rick, in the months of August, September, and
 “ October in the present year, and of the persons
 “ therein described as professing to act as arbitra-
 “ tors in said alleged courts; and these deponents
 “ say, that it also further appears by the said bill of
 “ particulars that the said several meetings therein
 “ specified are alleged to have been held during the
 “ interval from the 22d of March until the 6th of
 “ November in the present year; and say, that *five*
 “ *of said meetings are alleged to have been held since*
 “ *the said defendants were required to enter into re-*
 “ *cognizances to answer for the said alleged conspi-*
 “ *racy, and one of same being a meeting alleged to*
 “ *have been held since the time when the said bill*
 “ *of indictment was sent before the grand jury in*
 “ the present term; deponents say, that *wholly*
 “ *independent of said meetings in said indictment*
 “ and bill of particulars respectively mentioned,
 “ and which appear to EXCEED NINETY in num-
 “ ber, extending over a period of nearly nine
 “ months, the said indictment and bill of particu-
 “ lars respectively set forth and specify many other
 “ charges and matters of various facts intended to
 “ be relied on and made the subject of evidence
 “ in support of such prosecution, and in particular
 “ that the said defendants have collected large sums
 “ of money, not only in Ireland, but from the inha-

“ bitants of foreign countries and the subjects of
 “ foreign states, for the purpose of such alleged
 “ conspiracy; and say, that *the difficulties of pre-*
 “ *paring for the defence in the prosecution are gene-*
 “ *rally increased by the fact that several of the said*
 “ *defendants do not appear, and are NOT ALLEGED*
 “ OR CHARGED TO HAVE TAKEN PART IN MANY OF
 “ THE SAID MEETINGS, and other proceedings speci-
 “ fied or set forth in the said informations, indict-
 “ ment, and bill of particulars respectively, and
 “ have no personal knowledge whatever of such
 “ alleged meetings or proceedings, and in that respect,
 “ as deponents are advised and believe, the defence
 “ of each particular defendant must be not only
 “ separate and distinct, but in many instances
 “ wholly or essentially different from the rest of the
 “ others of said defendants; and further say, that
 “ such difficulties as aforesaid have been still fur-
 “ ther increased by the circumstance that *the*
 “ *names of the several witnesses produced and*
 “ *examined before the grand jury in support of the*
 “ *said bill of indictment have been withheld from*
 “ *the defendants*; and these deponents have been
 “ thereby compelled to make arrangements for the
 “ production of a much larger body of evidence
 “ than would otherwise have been necessary, with
 “ respect not only to the particular facts and details
 “ of the proceedings at each and every of such
 “ meetings, and connected therewith, and of the
 “ acts and speeches of the several persons who took

“ part in such proceedings, but also with respect to
 “ the means of knowledge and the statements re-
 “ specting same, and the motives, character, and
 “ conduct of each and every person *who these depo-*
 “ *nents have any sufficient reason to believe will be*
 “ *produced to give evidence for the Crown in support*
 “ *of said prosecution*, of an unfair or dishonest
 “ nature respecting said meetings, or any of them,
 “ calculated to prejudice the said defendants, or
 “ any of them; and these deponents say, they are
 “ advised and believe that, wholly irrespective of
 “ the particular and separate defence so ren-
 “ dered necessary, in many instances, for each
 “ of the said defendants in this prosecution, it
 “ is absolutely necessary for the defence of the
 “ said defendants generally that these defend-
 “ ants should be prepared with evidence as to
 “ *the true numbers, character, conduct, and de-*
 “ *meanour of the persons assembled at, and other cir-*
 “ *cumstances connected with, each and every of the*
 “ *meetings in the said informations, indictments, and*
 “ *bill of particulars respectively specified or referred*
 “ *to, and that they should also be prepared with evi-*
 “ *dence as to the several speeches made, the several*
 “ *resolutions proposed or adopted, the several acts*
 “ *done, the several letters and documents read, and*
 “ *the several proceedings which occurred or took*
 “ *place at each and every of the said several meet-*
 “ *ings; and further, that they should be prepared*
 “ *with evidence as to the object, character, and effects*

“ of the said several meetings, the said speeches so made, the resolutions so proposed or adopted, and the said acts so done thereat.”

We are now arrived at the period when it became the duty of the Chief Justice to deliver his charge to the jury upon the case; and although we have already, by anticipation, commented upon some portions of that unparalleled effusion, yet we must again advert to an address which will certainly be considered in all future times as one of the greatest curiosities in even Hibernian jurisprudence. It has been preserved in a separate state for the use of posterity, has been published by Her Majesty's printer in Dublin, and is said to have been authorised and corrected by the Chief Justice himself.

As a composition it is loose in its texture, confused, contradictory, and incoherent in the doctrines and principles which it lays or seems to lay down, totally destitute of precision, and almost equally wanting in perspicuity; whilst it exhibits every where the most perverse inappropriateness in the application of judicial authorities to the case actually before the court, and the most unjust and inaccurate estimate of the facts of the pending case as considered in reference to the circumstances of some others which it resembled in no particular, except the general nature of the offence imputed by the indictment. Of the judicial propriety, candour, and impartiality exhibited by his Lordship we shall at present express

no opinion; but we believe that no reader who peruses the present publication will have any difficulty in forming a very exact estimate of the amount of those most important qualities which Chief Justice Pennefeather showed forth upon the occasion in question.

At the very beginning of the charge appears the following astounding assertion: — “Gentlemen,” says the Chief Justice, “I call the case a *strange* one “*only* in reference to its *duration*! because, for “*myself*, I *do not feel* that it is a case in which there “exists *any great difficulty in the law*, or in the facts “upon which *so INTELLIGENT a jury* as I have now “the honour of addressing will finally have to pronounce their verdict.”

All the world is aware that the Chief Justice charged the jury for a conviction; that he considered the allegations in the indictment to be sufficient designations of offences known to the law, and that he considered the evidence as having established the allegations. It is notorious, that about one hundred pages of the authorised edition of the charge are occupied about the multitudinous meetings, and that the counts of the indictment, which are confined exclusively to the exhibition of great physical force at those meetings, have been declared by all the judges, and four out of five law lords in this country, to be good for nothing. Yet the Chief Justice of the Queen’s Bench in Ireland does not think that there is any great difficulty about

either that or any other part of the law of the case; and before he has read a syllable of the evidence to the jury, he openly declares that he does not anticipate that they will have any difficulty about the facts. The judge, who has already decided in his own mind that the defendants are guilty, begins his charge by informing the jury that he does not expect that they will have any more difficulty than he had in coming to the same conclusion. What "feeling" could a gentleman who so conducted himself entertain about the dignity or the responsibility of his office?

In order to justify this "feeling" that there was no difficulty about the law of the case, the learned judge proceeded to cite some authorities which he professed to consider as appropriate to the present case, and conclusive in themselves. Let us see what these cases were, as reported by himself. The first was the case of *The Queen v. Vincent*, in respect to which the Chief Justice proceeded to read the charge of Mr. Baron Alderson, in which the learned baron cited the authority of Hawkins, to prove "that any meeting whatever of great numbers of people *attended with such circumstances of TERROR as CANNOT BUT endanger the public peace, &c. is unlawful.*" He then cites Mr. Justice Bayley as laying it down in *Hunt's case*, that "if a meeting, from its general appearance, and all the accompanying circumstances, is calculated to excite TERROR, ALARM, AND CONSTERNATION, it is generally

“*criminal and unlawful.*” Mr. Justice Bayley goes on to state the kind of “circumstances” to which he alluded as being “calculated to excite “*terror, alarm, and consternation,*” and as impressing a character of illegality on the conduct of the parties. “If,” says the learned judge, “they have met at *unseasonable hours of the night,* or under circumstances of *violence and danger,*—if they have been *armed with offensive weapons,* or proposed to PUT TO DEATH “*any part of their fellow subjects.*” What mortal could believe that these authorities were cited for the purpose of proving the illegality of meetings, of which Mr. Justice Burton, in charging the grand jury in support of the bill of indictment, said that “*not only was it not the wish of the defendants to cause ANY BREACH OF THE PEACE at or through the medium of those assemblies, but that, on the contrary, it was a PRINCIPAL OBJECT with the LEADERS and CONVENERS of the meetings to PREVENT THE POSSIBILITY OF ANY INFRACTION OF THE PUBLIC PEACE;*” the correctness of which description was not only established by the official statements of the law officers of the Crown, and by all the evidence in the case, but *was expressly asserted by Chief Justice Pennefeather himself in the very charge in which he cites the case of The Queen v. Vincent as one having a resemblance to that of The Queen v. O’Connell.*

Mr. Justice Bayley and Mr. Baron Alderson are

cited as declaring that meetings will be illegal if the parties propose to *put their fellow subjects to death*, or come *armed with offensive weapons*, or come together under circumstances which excite *alarm and terror, and CANNOT BUT ENDANGER the public peace*. What conceivable bearing can such "authorities" have upon the case of meetings, which, according to the statement of the Solicitor General, "*terminated PEACEABLY, and without exciting ANY ALARM to the public,*" — the peaceable and unalarming termination of which, moreover, was *not* a lucky and unexpected *accident*, but one of the *deliberate objects of all the parties concerned*. The Solicitor General stated, that "the conspiracy was — *not to break the peace.*" The Attorney General described the *peaceable separation* of the meetings, and the *intention* that they should *so separate* as "a formidable part of the conspiracy." Yet, in reference to these meetings at, or before, or after which *no breach of the peace was committed or contemplated, nor any alarm excited*, and at which it was the actual as well as the universally declared purpose of all the parties concerned that *no breach of any law should occur*, — at which there actually was *no breach of the peace, nor any excitement of alarm, nor any injury, nor any apprehension of any*, to person or property, — it was in reference to these meetings that the Chief Justice quoted the authority of Mr. Justice Bayley and Mr. Baron Alderson, as having laid it

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down, that meetings are unlawful if the parties propose to *commit murder*, or to *go armed*, or assemble in such circumstances as *must cause public alarm*, and a *breach of the peace*. The case of *The Queen v. Vincent* was so far from having any resemblance to the prosecution of Mr. O'Connell, that it was in all essential points of a diametrically opposite character, as will be seen at once from the following outline of the case. The defendant was one of the Physical-Force Chartists *against whose conduct and example Chief Justice Pennefeather expressly stated in his charge that Mr. O'Connell was continually warning his own political adherents*. The first count of the indictment in the case recited that the defendants, intending to *disturb the public peace, &c.*, did conspire, and so on. The second count stated that they had met in a *menacing manner with OFFENSIVE WEAPONS, and DID cause great TERROR and ALARM to the peaceable subjects, &c.* The third was for *attending an unlawful assembly*, at which they *excited great alarm and terror by loud exclamations, cries, &c.* The meetings were *held at night*: the mob *hooted the authorities*. Mr. Vincent told the meeting, "*If any policeman interfered with them, to* " **BREAK HIS HEAD** ; *and if the yeomanry interfered* " *with them to THROW THEM OVER THE BRIDGE* ;" and exclaimed, "*Perish the privileged orders !*" "*Death* " "*to the Aristocracy !*" He said he "*should like to* " "*see Mr. Protheroe, one of the magistrates, HUNG*

“ UP TO ‘THE LAMP-POST!’” All the witnesses swore that the meetings *actually excited WELL-FOUNDED ALARM AND TERROR*; and *it was deposed that the CHARTISTS were TREATING for the purchase of ARMS*; and *one of the witnesses, who sold arms, deposed that he removed them from the shop to a private part of his house.* Such were the facts of a case which was cited as resembling that of *The Queen v. O’Connell*! But the transaction would not seem to be perfectly complete without the additional fact, that whereas the authority of Mr. Baron Alderson was vouched so vehemently for the purpose of proving that the description of the monster meetings upon the indictment was a sufficient description of illegal assemblies, *Mr. Baron Alderson himself*, in conjunction with all the other English judges and law lords, has since expressly decided that *it was not*.

The Chief Justice himself seems to have felt how absurdly inapplicable his authorities were to the case of the meetings before the court, and he accordingly endeavours to help them out with a new theory of his own, upon which we shall make some observations after we have presented it to the reader in the extraordinary language of the Chief Justice himself.*

“ I do not mean to say that the mere attending
 “ the meeting, *however large the numbers may be*,
 “ if no breach of the peace be committed, nor
 “ tendency to a breach of the peace, at the time,

* Page 38. of the authorised edition.

“ or immediately ensuing the meeting—I do not
 “ mean to say that a man’s attending such a meeting
 “ under such circumstances will be necessarily
 “ unlawful. I do not mean to say that it would
 “ be necessarily lawful. I shall explain that by
 “ and by ; but there is nothing in the mere fact of
 “ the assemblage of the people that renders that
 “ an illegal act. But in order to make the meet-
 “ ing unlawful *it would not be necessary*, though
 “ in fact the peace was *not* broken, that therefore
 “ the parties should *not* be guilty of the offence of
 “ exciting and *creating terror and alarm* amongst
 “ Her Majesty’s subjects. The meeting may,
 “ though the parties went to it unarmed, have
 “ been attended with demonstrations of physical
 “ force, that would *reasonably* have excited fear,
 “ *terror*, or *alarm* amongst the peaceable subjects
 “ of Her Majesty *in the neighbourhood, whether*
 “ *there* WAS CAUSE FOR IT OR NOT ! beyond the enor-
 “ mous mass and multitude of persons assembled ;
 “ and if *persons were* alarmed and terrified by that
 “ mass and multitude so assembling, why, then,
 “ the *terror so caused* WOULD HAVE SHOWN *that to*
 “ *be an illegal assembly*, for which the parties so
 “ assembling would be answerable. But it is not
 “ necessary that that should have been the state of
 “ things, in order to make that an unlawful as-
 “ sembly. Suppose the parties all went to that
 “ great meeting in ever such great multitudes—
 “ suppose they went without arms—*suppose they*

“ *conducted themselves with great propriety and*
 “ *regularity — suppose no breach of the peace was*
 “ *committed — suppose no then tendency to a breach*
 “ *of the peace was committed — all those facts might*
 “ *concur toward the establishment of the innocence*
 “ *of that meeting ; and yet, Gentlemen of the Jury,*
 “ *that meeting might have been an illegal assembly!*
 “ *Suppose that the object of collecting those hun-*
 “ *dreds and thousands of persons was, not for the*
 “ *purpose of committing a breach of the peace — sup-*
 “ *pose they had an ulterior and more remote object*
 “ *— suppose it was not for the purpose of terrifying*
 “ *the neighbours by what was done, or intended to be*
 “ *done, by the persons assembling at that meeting —*
 “ *but suppose that the parties who collected that*
 “ *multitude together did so for the purpose of*
 “ *making a demonstration of immense force and*
 “ *physical power, guided and actuated by the will*
 “ *and command of the person who had caused that*
 “ *multitude to assemble, for no purpose of a pre-*
 “ *sent breach of the peace, but for the purpose of*
 “ *making an exhibition to those with whom he had*
 “ *to do, to those who were the legal legislators of*
 “ *the country ; and that his object in calling all*
 “ *those people together — his object in assembling,*
 “ *dispersing, recalling them, was to do that with*
 “ *the greatest possible notoriety — suppose he did*
 “ *it in the open day, where all the world could see*
 “ *and hear him, and that he had as his object to*
 “ *overawe the Legislature, who are likely to have to*
 “ *consider certain political subjects in which he*

“ had his own views and his own interests — for
 “ the purpose of *detering the Legislature* and the
 “ *Government of the country* from a free and cool
 “ deliberate judgment on the subject:—if that were
 “ his object in causing and procuring that demon-
 “ stration, then, Gentlemen, I say that that is an
 “ illegal object in him, and in all who concur and
 “ are agreed with him in procuring such means for
 “ such an end.”

The reader will observe that the Chief Justice, at the beginning of this passage, admits that a meeting will *not be illegal MERELY in consequence of the MULTITUDES who attend it*, if there be no other ground for imputing illegality except *the numbers alone*. Immediately afterwards he says that the meeting may be illegal as *causing* what he calls *reasonable* terror in a *rational* person, although the *rational* person had *no reason* for the alarm *except the numbers alone!* Whilst this palpable and ridiculous contradiction involves, or rather composes, a hypothesis that the *peaceable subjects* of the Queen *in the neighbourhood* of the meeting were alarmed—a supposition which was not only *contradicted, but even repudiated by the very law officers of the Crown themselves*, who placed their case upon a totally different ground. Whilst the Chief Justice was talking about the alarm of the neighbourhood, he knew of course that in the case before the court *there was no alarm*, and that the Solicitor-General, after the whole of the evidence had been given, stated expressly, and several times,

*that NONE of the meetings had excited ANY ALARM at all, and that any prosecution against any one of the meetings upon that ground would have been triumphantly defended and deservedly defeated.**

Having in this manner endeavoured to incorporate with the evidence a state of facts which did not exist, the Chief Justice proceeds to perform the same sort of operation with respect to the law, and addresses the jury upon the supposition that the charge against the defendants upon this point was that of conspiring, by the *exhibition of great physical force, to intimidate the LEGISLATURE, and the GOVERNMENT.* "If you believe," says the Chief Justice to the jury, "that the object of the persons who collected those multitudinous meetings was to intimidate and overawe the *Legislature and the Government*, by the exhibition and demonstration of the great physical force assembled at such meetings, I am of opinion that that object was unlawful, and that if more than one concurred to procure it, they are guilty of a conspiracy." Now, from the beginning to the end of the indictment, there is no charge of conspiring, by the *exhibition and demonstration of great physical force, to intimidate and overawe the Parliament or the Government.* The offence which the Chief Justice presented to the jury, in the passage which we have cited, as well as in several other parts

* See ante, p. 162. 165., the evidence of the policeman, who deposed that even at the monster meeting at Mullaghmast, the only accident that he observed was that some *gingerbread* was thrown down.

of his charge, *was NOT IMPUTED to the defendants, and was NOT IN ISSUE* before the court. There is no charge in the indictment of conspiring to *intimidate the Government* at all, by force, or by any thing else. Notwithstanding which the Chief Justice continually describes the charge as a conspiracy to intimidate, by the exhibition of great physical force, the actual “Ministers of the Queen,” and the persons engaged in carrying on the government of the country — there not being a syllable about the Queen’s Ministers from one end of the indictment to the other; and we cannot help considering it to be a most unconstitutional and unjustifiable proceeding in Chief Justice Pennefeather to present the case in a false aspect to the jury, and endeavour to supply, by his address, that which he *must have known not to be in existence upon the record*. The allegation upon the subject of intimidation to be produced by the exhibition of physical force was declared by the unanimous voice of the judges and law lords in England to be worthless, upon the following, along with other grounds, that the word intimidation had not *necessarily* an *illegal* meaning, that upon the *present occasion* it was used in its *popular* sense, that it did not appear *what sort of fear* was intended to be produced, nor *upon whom* it was to operate, whether upon the *peaceable inhabitants of the neighbourhood*, or the subjects of the Queen in Ireland generally, or the persons in PUBLIC AUTHORITY *there*, or the LEGISLATURE of the *Realm*; that there was no allegation that the phy-

sical force was *threatened to be used, or intended to be used*, and that the “exhibition and demonstration of physical force” therefore in the circumstances could not mean any thing more than the *mere display of numbers*. Yet, although every one of these allegations was wanting, the Chief Justice addresses the jury upon the footing that they are all upon the record, and founds this part of his charge upon a supposition which *he must have judicially known to be destitute of any foundation*; and this incredible statement, in the course of which he expressly declares that an *innocent* meeting may be *illegal*! that a meeting may be *legal* and *illegal*, *innocent* and *guilty* all at the same time, he winds up by declaring that he has been laying down “the clear and incontestable law upon the subject!”—which “clear and incontestable law” has since, as all the world knows, turned out, “clearly and incontestably,” to be no law at all.

“Having stated that there was no such charge in the indictment as that of conspiring to *intimidate either the Government or the Parliament, or any member or members of either body*, by the exhibition of physical force, it may be as well to add that a charge of conspiring to intimidate the *Parliament* by certain *speeches and writings* is contained in the eleventh count. That count, however, contains *no charge of any offence connected with the exhibition of great physical force*; and there does not throughout the whole of “this volu-

" minous, unwieldy, and unintelligible document" occur any such charge as that which was so often presented to the notice of the jury under such designations as " exhibiting great physical force" to intimidate " the Government" or " the Parliament," or the " persons in office," or " in authority," or the " legal legislators," &c. &c.

But the observations which we have made upon this point are not applicable to this part of the subject alone. Throughout the whole of the trial one charge was imputed in terms by the court and the prosecutors, whilst another was imputed by the record. In page 189. the Chief Justice describes the charge about the arbitration courts as a charge of combining in order to " put down the existing courts of justice as derived from the appointment of the Queen." In page 191. he describes the same charge as a charge of " combining to *deny the power of the Crown to erect courts of justice,*" for which description there did not really exist a shadow of pretence either in the evidence or indictment. The counsel for the prosecution, in arguing the case at the bar of the House of Lords, took the trouble to give an explicit contradiction to this part of the Chief Justice's charge, by saying * " *There is NO STATEMENT of a combination to get the tribunals changed; the tribunals are to remain, but the combination is to WITHDRAW MATTER FROM their cognizance.*" So far was it from being true, that Mr. O'Connell had

* Clarke & Finnely, vol. ii. part i. p. 228., just published.

denied or depreciated the power of the Crown, that the Chief Justice himself expressly declares Mr. O'Connell to be guilty of sedition* for stating the power of the Crown as being *greater than that which Her Majesty possesses according to the opinion of Her Chief Justice of the Queen's Bench in Ireland*. All the evidence throughout the whole case proved eminently and repeatedly that the most loyal injunctions were issued at all times by Mr. O'Connell to the people, and that the people responded cordially to such intimations — being deluded, as the law officers themselves assert, by Mr. O'Connell into the notion that Her Majesty was their friend upon the subject of the Repeal. His Lordship continually sneered at the defendants upon this point, as upon every other†, and very plainly intimated his opinion that these professions of loyalty were not sincere. To say, however, that they denied the power of the Crown to constitute courts of justice was to say what was diametrically opposed by the very evidence which was read by the Chief Justice himself.

* Page 27. of the official edition of the speech.

† The following is a sample of his Lordship's humour upon this point: "It is now called the 'Loyal National Repeal Association.' *Stet nominis umbra*. Whether you think *there is any thing in that or not, it is for you to say*." With great respect for his Lordship, "*it was not for them to say*." The jury "had nothing to say to it." Mr. Justice Crompton, in giving his judgment upon the motion for a new trial, expressly declared that the Attorney-General did not impute any illegality, much less any disloyalty to the Association, *even in his speech*. There was nothing at all about it on the record.

Every other part of the case was treated in the same style. From an address which was printed and circulated by the Repeal Association, and signed by Mr. O'Connell, he read the following passage:—"But, Irishmen, we suffice for ourselves. Stand together—continue together—in *peaceful conduct*—in *loyal attachment to the throne*—in constitutional exertion, and in *none other*." The Chief Justice, having read the passage, says to the jury, "Is that evidence of intimidation, or is it not?" Now if the expression of a determination to continue in "*loyal attachment*," "*constitutional exertion*," "*peaceful conduct*, and "*none other*," is to be taken as the *language of intimidation*, there can be no fixed or definite meaning in language at all; and the use of it must be, not as a source of illumination to the world, but as the means of enabling mankind to conceal their ideas from each other. We request the particular attention of the reader to the following passage:—

"Now there were in connection with the Association three gentlemen," [Messrs. Gray, Barrett, and Duffy,] "who are all of them at present among the traversers at the bar, who were respectively proprietors of certain newspapers in the city of Dublin, — I need not say one way or other as to the tendency of their contents.* The Repeal-

* It must have been a most wonderful stretch of heroic impartiality to abstain from telling a Dublin jury what the politics were of the Pilot, the Freeman, and the Nation.

“ wardens were to take care that in their respective districts a certain number of newspapers should be provided—not newspapers *generally*, of whatever class the parties might think it necessary to inform themselves *in point of politics* — NOT THE “EVENING MAIL!!! OR A PAPER OF THAT KIND, BUT *the Freeman’s Journal and the Pilot*, of which Dr. Gray and Mr. Barrett are “the proprietors.” So that the charge against Mr. Gray and Mr. Barrett is, that they being Repealers did not assist in the diffusion of Orange politics, and that, having no other income except what arose from the sale of their newspapers, they did not help to increase the profits of another property to the diminution of their own! Poor Mr. Duffy’s guilt is yet more enormous in this respect than that of either of the others, or of both together; for as his paper, the “Nation,” was not included in this arrangement, he could not obtain any profit by the monopoly, and whereas Gray and Barrett were guilty of giving an Irish kind of “fraudulent preference” to the sale of their own papers, Duffy gave a still more Hibernically fraudulent one to the papers of Gray and Barrett above his own. Gray, Barrett, and Duffy are guilty of a conspiracy—Gray and Barrett of conspiring not to circulate the commodities of Remmy Sheehan, Esq.*, who keeps “the house over the way,” whilst Mr.

* This gentleman is said, in the speech of Mr. Sheil, to be the proprietor of the Evening Mail.

Duffy, with the uncalculating disinterestedness of a true Irish patriot, conspires *not* to circulate *his own*. As it seems difficult to believe that any sane person occupying such a situation as that in which Mr. Pennefeather is placed could have given utterance to such a mass of melancholy nonsense, we beg leave to say that the passage to which we have referred is found in Mr. Flanedy's Report, page 458.; in the Report of Messrs. Armstrong and Trevor, page 830; and in the 57th and 58th pages of the Report of the Charge, as published by the Queen's printer, and said to have been corrected by the Chief Justice himself.

Mr. Fitzgibbon having corrected an error into which the Chief Justice had fallen in a part of the statement, his Lordship observed, "It does not matter very much. What I was stating was, that the papers recommended to be furnished were *all* of THAT POLITICAL CLASS, *whether it was Dr. Gray's paper or not.*" A jury, from which every individual of the political party of the defendants has been extruded, are called upon by a judge who is of the same politics with the jury, and of hostile politics to the defendants, to find two newspaper-owners guilty of sedition because they circulated their own papers *without circulating those of the party to which the judge and the jury belong!!* Such a judge expressly directs such a jury to find their *political antagonists guilty*, upon grounds which are

not only expressly political in their character, but are so futile and ridiculous in themselves, that they would bring discredit upon a Court of Requests, much more upon Her Majesty's Court of Queen's Bench.

It ought, however, to be mentioned, in justice to the learned judge, that he seems, at the instant when he delivered the very extraordinary passage which we have just cited, to have been seized by a very unusual fit of sentimentality towards the "*poor country people*, to whom these papers "were to be read, and who had subscribed their "shilling a year;" which, as his Lordship takes the trouble to calculate, "amounts to a farthing "a week" for the use of the papers in question. "Consider, gentlemen of the jury," says his Lordship, "what the effect of these papers" (the 'Pilot' and 'Freeman') "must be when circulated among the *poor people* over all Ireland*," without the countervailing accompaniment of the *Evening Mail*, or any other paper of *that sort*. After dwelling upon this very distressing condition of affairs, in which the *poor people*, for their farthing a week, are obliged to put up with papers of their own politics, and to take the bane of the "Pilot," without the antidote of the "Packet†," he goes on to make the following more serious observation‡:

* Page 58. Queen's printer's edition.

† An Orange paper.

‡ Page 59.

“ These are matters that ought to be constantly kept before you, when you recollect that the Crown complains of a conspiracy by intimidation, and by *the demonstration of physical force to overawe the legislature of the country.*” It is scarcely necessary for us to repeat what we have already stated so often, that the alleged offence of combining to overawe the legislature by the demonstration of great physical force is a mere, pure fiction, there being no such offence charged upon the defendants by the record. But even if such a charge existed in the most express, direct, and unequivocal form, the reader will, perhaps, have as much difficulty as we have had in discovering how such a charge could be established, by showing that the poor people throughout the country, for their farthing a week, were obliged to content themselves with the politics of the “ Pilot ” and the “ Freeman,” without any perusal of the “ Evening Mail,” or “ *other paper of THAT sort.*”

The reader has already seen that the Chief Justice intimated very distinctly his opinion of the defendants’ guilt, even before he began to read the evidence to the jury.

The manner in which he proposes to neutralise this intimation is as remarkable as the intimation itself. In page 10. he observes, “ I do not mean to say this, anticipating one way or the other— God forbid—what conclusion you may come to.

“ upon the subject.” In one place* he says, “ I do *not* say that any of the traversers are guilty.” In another, “ I anticipate nothing against any body here, *as yet*. I put it rather *by way of example*, than as *bearing upon the present case*; and “ I desire that in what I have said it may be rejected from your minds altogether as if I were giving any thing like an opinion, or any thing bordering upon an opinion, with regard to the facts of this case, which will be for your final decision. But I am putting it by way of exemplification. Secrecy is not necessary. If the parties conspired, that is, agreed together, upon a common illegal basis and design, to *overawe the Parliament* of the country, to cause *alarm and terror amongst her Majesty’s subjects*, by collecting together in the open day large bodies of the people, the more numerous, the more public, the more adapted to the end of the party who called them together, his object being all along to *create terror, intimidation, and overawing*, this would be brought about by more public demonstration than by secrecy or concealment.”† All this he utters with apparently the most perfect gravity, as if he really believed that the jury would consider it as not “ bearing upon the present case;” and as if by “ the parties,” whom he supposes to have conspired, the jury would not at all understand the parties who were the defendants

* Page 41.

† Page 11.

at that moment upon their trial; or as if they could suppose that the individual alluded to in the expression "*his* object," &c. was some shadowy and imaginary personage *in nubibus* or *in gremio legis*, and not Mr. Daniel O'Connell, who was corporally in the view of the Court, and who was charged with having "in open day collected large "bodies of men, in order, by the exhibition of great "physical force, to procure changes in the law, &c."

After citing the authority of Baron Alderson's charge in the case of *The Queen v. Vincent*, in which the learned Baron recommends that meetings, in order to their being legal, should be *peaceable and open*, the Chief Justice proceeds to say upon his own part, that "there is not one word in that "charge in which he does not fully concur, and to "which he is not fully satisfied to subscribe upon "any and every occasion." Having thus fully subscribed to the doctrine, that meetings will be lawful if they are peaceable and open, when the evidence in the Irish case proves that the meetings were exactly of this character, Chief Justice Pennefather shifts his position, quits the authority of Baron Alderson, and cries out, as the reader has just seen, "*the more open and more peaceable the* "WORSE!" It is difficult to say which is more shocking to common sense in this instance, the general absurdity or the particular inconsistency.

But we must part company with his Lordship at last. His whole charge, from the commencement

to the conclusion, is a continued series of curious improprieties; the only way of exhibiting a complete picture of which to the reader would be a reproduction of the whole oration *in extenso*. We shall only mention, before we finally take leave of his Lordship, a few additional specimens, which, added to those already produced, would furnish forth a small *spicilegium* of the most remarkable parts of this most wonderful address. In one of his facetious moods*, he quizzes the teetotallers of a monster meeting by likening them to the armies of Xerxes, who *drank up rivers* in their march, and pleasantly, but *partially*, quotes a passage from Juvenal upon that subject:

“ Epotaque flumina Medo
Prandente.”

The remainder of which is at least as material as that which his Lordship repeated:

“ Et madidis cantat quæ Sostratus alia.”

“ With a long legend of romantic things,
“ Which in his cups the *boosy* poet sings.”

DRYDEN'S *Translation*.

* “ Gentlemen, there was a dinner, as there had been at
“ other of the monster meetings,

‘ Epotaque flumina Medo
Prandente;’

“ and the *conviviality* of the evening was enlivened by a speech
“ from Mr. O'Connell.” (a)

(a) Page 89.

The following is a sample of the vigour of his language, and if the imagery were correct, it would certainly, and very effectually, take away all hopes from the most resolute Repealer of ever seeing Ireland again resume the shape of a separate political existence. "Ireland," says his Lordship, "being by the effect of the Union swallowed "up*" in the United Kingdom.

After having stated the substance of a speech delivered by Mr. Barrett at Mullingar, his Lordship makes the following pleasant addition to the principles of presumptive evidence:—

"He," [Barrett] "not only spoke the speech at Mullingar, but I," [the Chief Justice] "*take for granted!* that he wrote the speech down when he "went to Dublin!"†

Some of his concessions to the right of discussion and petition are not a little curious. In one place he says‡, "*It is NO CRIME for a man to have a grievance! or TO THINK he has it, or to MAKE A MISTAKE with regard to his political position in respect to that "grievance."* What a wonderful quantity of liberty must be involved in this admission, deliberately made even upon the bench of justice, that it is actually "*no crime in a man to have a grievance!* "nor even to think he has one!! or still more to

* Page 69.

† Page 77.

‡ Page 37. edition of the Queen's printer.

“ make a mistake in his political position in respect to it!!! ”

One of the principles upon which he regulates his method of leaving the case to the jury is amongst curiosities a curiosity. He says to the jury, “ The onus is on the Crown, and that is another reason why *I pass over without more particular detail the evidence given on behalf of the traversers!* ”* Upon reading such a passage all that one can do is to sit mute with astonishment. All commentary upon such a statement is equally superfluous and impossible.

Equally strange, and equally unintelligible and inappreciable, to us at least, is the following proceeding: —

After having read at full length, and commented upon certain documents which were given in evidence for the prosecution, he says†, “ Now I suppose, from what has been said by Mr. Moore, the gentlemen ” [the counsel for the defendants] “ will not allow this document to go to your ” [the jury’s] “ room; *I have THEREFORE (!) read it more in detail than I should otherwise have done.* ” We confess ourselves unable to understand upon what principle it is that a document which ought not to go before the jury may be read and commented upon by the Judge. And still less can we understand why the fact that the document ought not to

* Page 52.

† Page 185. of the official edition.

go to the jury can be *a reason* for the judge's reading it in detail, and commenting upon it at his discretion. With regard to the expediency of such a proceeding we are, in the present case, a little more, if possible, in the dark, as we cannot see in the circumstances of the case what the defendants could gain by keeping the document out of the hands of the jury after it had been read and commented upon by the Chief Justice. The following occurrence may tend in some degree to justify our scepticism upon the latter point. In a document called the "Crisis," which appeared in Mr. Duffy's paper, there occurs the following passage:— " We have gloried in the " irresistible efficacy of *a new element in* POLITICAL " *warfare* which we boast to have invented, and by " whose employment we have already won many " outposts."

Having read the sentence immediately preceding this passage, the Chief Justice went on to the sentence immediately following it, having of course overlooked the intermediate passage itself. The following is the account of the transaction as it appears in the Report of the Charge*:—

" For weal or for woe—for ages of bondage
 " or centuries of independence—we stand com-
 " mitted. Forward and prompt action is sure of
 " its reward in speedy and glorious triumph—
 " the criminal abandonment of opportunity is
 " equally certain to be avenged in the perpetuation

* Page 170, 171.

“ of misrule. In the making or marring of our own
 “ fortunes, we involve to an incalculable extent the
 “ hopes of the whole human family.”

[In this place comes the passage which the Chief Justice overlooked.]

“ We purposely postpone critical details of the
 “ plan submitted under the sanction of *O'Connell's*
 “ name, and with the authority of the Associ-
 “ ation — contenting ourselves to admire, and
 “ inviting our countrymen to admire with us, the
 “ symmetry of the temple of freedom raised for
 “ their reception.”

Mr. Whiteside. “ A sentence, my Lord, inter-
 “ venes : ‘ We have gloried in the irresistible efficacy
 “ ‘ of a new element in political warfare, which we
 “ ‘ boast to have invented, and by whose employment
 “ ‘ we have already won many outposts.’ ”

The Lord Chief Justice. “ Where is that ? ”

Mr. Whiteside. “ In the article, my Lord ; a
 “ sentence or two before that.”

The Lord Chief Justice. “ I do not see it, Mr.
 “ *Whiteside*.”

Mr. Whiteside. “ It is just after the words
 “ ‘ human family ; ’ and then it is the statement of
 “ what the writer means : ‘ We have gloried in the
 “ ‘ irresistible efficacy of a new element in political
 “ ‘ warfare ’ — *political warfare* — ‘ which we boast to
 “ ‘ have invented, and by whose employment we
 “ ‘ have already won many outposts.’ ”

The Lord Chief Justice. “ Well — you read it.”

Mr. Whiteside. — “That is all, my Lord.”

The Chief Justice concluded his charge by expressing to the jury a confident hope “that the Lord who rules over all would enlighten and direct them.” If, however, we may be allowed to draw any conclusions from the succeeding declarations of the jury themselves, we should venture to suppose that no particular amount of enlightenment was accorded in consequence of the pious prayers of the Judge; whilst their conduct exhibited very unequivocal traces of their being under the influence of something very different from *celestial* direction. Upon coming into court on Saturday the 10th of February, they stated that they were *perplexed* about the form of the issue, and that the *first and second counts they did* NOT UNDERSTAND, *although* they mentioned that they were *entirely agreed among themselves as to* THE VERDICT WHICH THEY WOULD GIVE.* The jury, having given this happy evidence of their intelligence and impartiality by intimating their determination to find the defendants guilty upon issues which the jury themselves declared that they did not understand, Mr. Justice Crampton addressed himself to the task — equally difficult and useless — of explaining to them that which was the cause of their extreme perplexity. In this effort the learned judge represented himself as having totally failed †, whilst the jury were present in court. After the

* Armstrong and Trev., p. 887.

† Ibid.

retirement of that body, however, his lordship occupied himself in preparing a second edition of the issue paper, with alterations and amendments; and this castigated copy was, at the next meeting of the court, publicly read and handed to the jury, after it had received the sanction of all the judges, and of the law officers of the Crown.

When the jury next came into court and returned their verdict they said *nothing upon THE FIRST or SECOND COUNTS* of the indictment, *wishing to pass them over* altogether, for the very sufficient reason alleged by Mr. Justice Crampton, "that *they did not understand them.*" Upon the same occasion, the jury having found four of the defendants guilty on the 3d count, *said NOTHING about the four others.* On the 4th count they found *nothing* about Mr. Tierney, whose name they did not mention. On the 5th count they found all the defendants guilty; *on the 6th count they found NOTHING.* On the 7th they said *nothing of Mr. Tierney.* *On the 8th and 9th counts there was NO FINDING.* Upon the 10th, which was for the offence of conspiring to bring the Irish tribunals into disrepute, they found all the defendants guilty. Upon the 11th count, which was the last, *there was no finding at all.* When, therefore, the verdict was originally brought in, it contained *nothing whatever* about the 1st, 2d, 6th, 8th, 9th, and 11th counts. With regard to these counts the jury were wholly and absolutely silent. With regard to the charge in the 3d count, they

were silent as to four of the defendants; and with regard to the 4th and 7th as to one. The verdict as it then stood was a verdict of guilty against all the defendants upon the 5th and 10th counts; against all but one upon the 4th and 7th; and against four out of the eight defendants upon 3d count alone. The counts, therefore, upon which the jury found any thing at all, were the 3d, 4th, 5th, 7th, and 10th. With regard to the 10th count, it imputes to the defendants that they conspired to bring into disrepute the legal tribunals in Ireland, and to diminish the confidence of Her Majesty's Irish subjects therein; to which is added in the 3d count, that the defendants combined to induce the people to withdraw the settlement of their differences from the established courts, and transfer it to others to be constituted for that purpose. The 5th charges a conspiracy to excite disaffection and seditious opposition to the Government, and hostility among different classes of the QUEEN's subjects, and contains no allegation about the monster meetings or physical force. The 4th count consists of the 5th, with an addition about the monster meetings in the words of the 6th and 7th, which have been declared unanimously by the Judges in this country to contain no charge of any legal offence at all. There only remains, therefore, the 3d count, which charges the seditious opposition to Government, the multitudinous meetings in the form which all the Judges have declared to be

worth nothing, the causing of discontent in the army, and the charge of bringing the established courts of justice into disrepute, and to cause the people in Ireland to submit their claims and differences to the arbitration courts recommended by the Repeal Association. With regard to that part of this count which relates to the monster meetings, it has been decided, as we have already so often observed, to be worth nothing at all.

Taking, therefore, the case of Mr. O'Connell alone, the jury originally found him guilty upon the 3d, 4th, 5th, 7th, and 10th counts. The matter charged in the 10th count is certainly not very important in the circumstances of the case, and the addition made to that in the 3d count we have already shown to be not illegal, but meritorious. The 7th count is good for nothing. The verdict may, therefore, be considered as reduced to a verdict upon the 4th, 5th, and 3d counts. The latter part of the 4th is the same as the 6th, which has been decided to be worth nothing. The verdict then becomes a verdict upon the 3d, the 5th, and the first part of the 4th. But the first part of the 4th is the same as all the 5th, and the verdict becomes, therefore, a verdict upon the 3d and 5th. Now, the 5th is identical with the first part of the 3d; and the verdict, when all the necessary deductions have been made, resolves itself ultimately into a verdict upon the 3d count of the indictment. This count contains, along with other charges, a charge

relating to the monster meetings; but as this charge is expressed in the terms of the 6th count, which has been decided to be no charge at all, that part of the count goes to the ground as a matter of course.

From all this we conceive it to be as clear as daylight that the verdict, as originally returned, contained no verdict of guilty against any of the defendants upon any legally valid imputation upon the subject of the monster meetings, in reference to which the whole prosecution was instituted, and in reference to which the principal part, if not the whole, of the punishment was professedly inflicted. It is quite clear that when the jury first brought in their verdict, they considered that they had done with the case, and that their labours were at an end. Mr. Justice Crampton had, in open court, previously stated that, in his opinion, he could properly receive a verdict in which there was a finding upon some counts and no finding upon others. The jury, after this, bring in a verdict in which they say nothing about the 1st, 2d, 6th, 8th, 9th, or 11th counts, and it is clear as daylight that they did not at that time intend to find anything upon those counts. The conversation which took place upon the reading of the verdict proves this beyond the possibility of any doubt. The foreman said that the first count was too comprehensive; and one of the jurors, Mr. Floyd, expressly asked Judge Crampton "Whether the verdict would be correct,

“if they found NOT GUILTY upon the FIRST and SECOND counts?” And this part of the exhibition concluded by Mr. Justice Crampton’s declaring that he would not receive the verdict, as there was no finding upon some of the counts, *he having, himself, publicly and expressly declared, BEFORE the verdict was returned, that HE WAS AT LIBERTY TO RECEIVE SUCH A VERDICT.* The jury retired, the Court adjourned, and at its re-assembling was graced by the presence of the Chief Justice, Mr. Justice Burton, and Mr. Justice Crampton.

The last-named judge informed his learned brethren publicly of what had occurred in their absence at the preceding sitting, and stated that the jury, *“although they did not UNDERSTAND the first and second counts, and were manifestly perplexed about the form of the issue, had entirely agreed as to the verdict which they were to give.”* After bearing this very flattering testimony to the intelligence, impartiality, and consistency of the jurors, his Lordship went on to inform the other members of the Court that he had prepared a second edition of the issue, which he accordingly produced, and which, after having received the approbation of the other judges, and of the Attorney-General, was handed up to the jury, upon whom it had the effect of inducing them to produce a second edition of their verdict, with some very eminently important alterations and additions; for, having in the first verdict passed over the first and second counts;

having declared that those counts were too comprehensive, having been "manifestly perplexed" by them; having declared that they did not understand them; having inquired if they could not with propriety find a verdict of not guilty upon those counts; they now find Daniel O'Connell, Barrett and Duffy guilty of all the matter charged in both these counts, omitting three words; they find John O'Connell, Steele, Ray, and Gray, guilty of all, with another omission; and they find Mr. Tierney guilty of the first part of each of those counts. Upon the first occasion, they found nothing upon the sixth, eighth, ninth, and eleventh counts; they afterwards discover, when properly instructed by the Court, that *all* the defendants, except Mr. Tierney, are guilty of all the matters charged in all those counts respectively. The result, however, of the correction of the first verdict, and formation of the second issue, must have eminently amused those persons who, with *Hamlet*,

"Think it sport to have the engineer

"Hoist with his own petard."

as the effect of the special interposition of the Court and Attorney-General has been, to take the first, second, third, and fourth counts of the indictment out of the record. The ultimate condition of that monstrous document is, therefore, this—There are, or rather *were*, eleven counts in the indictment. Of these the sixth and seventh counts — the most

important in the indictment — were originally, essentially, and utterly worthless in themselves. The second, third, and fourth were made worthless by the findings of the jury; which findings were composed by the Court in the presence of the Attorney-General, and which received his actual sanction, and that of the other Crown lawyers, upon the spot and upon the instant. The remaining counts were made worthless by the fact that the judges inflicted the punishment in reference to the counts which were incurably bad, but which they considered to be unexceptionably good.*

A motion was afterwards made for a new trial. Most of the grounds upon which the application was placed are of a nature not well adapted for discussion in the present publication. There is amongst them, however, one, the merits of which may, as we think, be justly appreciated by any person of ordinary capacity; and as that one formed the most prominent subject of the

* The Lord Chancellor (a) describes, in the following words, the final condition of the indictment in this respect: — “It was “stated as the unanimous opinion of the” [English] “Judges, “and I entirely concur in that opinion, that the erroneous “findings of the jury, and the erroneous entry of such findings, “are *altogether void*; that they are to be considered as *no* “*findings*; and that a good count upon which there is no finding is in its effect the same as a bad count upon which there “is a good finding — it is a *mere nullity*.”

(a) Judgment, p. 3, 4.

judicial difference, and as it related to the case of the principal defendant, and constituted the principal ground upon which he relied for the success of his application, we shall take the liberty of making a few observations upon the subject.

In the course of the trial, and for the purpose of proving that Mr. O'Connell upon certain occasions attended certain meetings, and gave utterance to certain opinions, copies were put in of the "Dublin Pilot," and of the "Freeman's Journal," containing what professed to be statements of the attendance of Mr. O'Connell at these meetings, and reports of the speeches which he was said to have there delivered. No other evidence whatever was given, either of the speeches or attendances, except the mere production of the newspapers themselves; and the question as to this point upon the motion was, whether these newspapers had been properly received as evidence of the truth of the statements therein contained, of Mr. O'Connell's having attended the meetings and given utterance to the sentiments in question. If Mr. O'Connell had been the sole defendant upon the trial, and was there upon a direct and substantive charge of having spoken the speeches and attended the meetings in the manner which the newspapers professed to record, no person having the slightest acquaintance with subjects of that nature could be so ignorant as to think that the charge could be proved by the production of the papers; and no counsel in the

empire would so affront the good sense of any judge as to tender such documents for such a purpose. It was, however, contended in the present case, "upon the other side," that as the papers in question were published by Barrett and Gray, who were themselves upon their trial for having conspired with Mr. O'Connell, and as the papers were evidence respectively against the respective publishers, they were evidence against the co-conspirator of the publishers as acts done in furtherance of the common object by Gray and Barrett; and as, therefore, being acts which, according to the law of evidence relating to conspiracy, may be given in evidence against Mr. O'Connell, although he had not personally participated in the publication of the reports, and may, as a matter of fact, be absolutely ignorant of their existence. It seems to be universally acknowledged, and we believe it to be an undeniable fact, that such evidence was never before admitted for the purpose for which this evidence was adduced upon the recent occasion; and the exposition which the three judges of the Irish Court of Queen's Bench have given, of the grounds of their judgment in favour of its admissibility, appears to us to show very clearly that the decision is as wrong as it is novel.

The Chief Justice, adopting the words of Mr. Phillipps (*Treatise in Evidence*, ch. v. sec. 4.), observes that the "act of the publication being done "by one conspirator in furtherance of the common

“ design, was to be considered as done by him in
 “ the character of agent to his co-conspirators ; and,
 “ *therefore*, that if Mr. Barrett published a statement
 “ of Mr. O’Connell’s speeches and proceedings at
 “ public meetings, he published it as the agent of
 “ Mr. O’Connell.” Now, *in the very place where the*
Chief Justice found the first part of this doctrine, he
must have also found that an exception was made in
regard to such declarations or statements as consisted
in relations of antecedent events. The conclusion,
 therefore, which the Chief Justice drew from one
 part of the text, was *actually prohibited by another,*
 and that which his lordship has deduced as a con-
 sequence from the rule, is declared *by his own*
authority to be an exception to it.

The published accounts of the judgment of
 Mr. Justice Burton represent him as concurring in
 the judgment of the Chief Justice, upon the same
 grounds and upon the same authority, and making
the same omission of any reference to the exception
which we have already mentioned, and which, in fact,
altogether governs the present case. In regard to
 Mr. Justice Burton, it is, however, extremely sin-
 gular that, in support of his own and the Chief
 Justice’s view, of the admissibility of such papers
 for such a purpose, he actually refers to the case
 of the *King v. Hardy*, which is *the very authority*
upon which Mr. Phillipps relies for their exclusion.

But the extravagance to which Mr. Justice
 Crampton has carried this novel doctrine is per-

fectly romantic, and absolutely soars into the sublime of the absurd. He says, "that *even though every speech and every fact stated in the newspapers were FALSE, they were as MUCH EVIDENCE AGAINST MR. O'CONNELL AS IF HE HAD WRITTEN EVERY LINE OF THEM.*" This is one of those daring flights of imagination, before which criticism falls prostrate in utter and impotent amazement.

There must be an overwhelming amount of judicial daring about a judge who thus boldly, wantonly, and unnecessarily evokes and looks coolly into the very face of the wildest combination of absurdity and injustice which could be generated by the operation of his own principles. Some of the obvious and inevitable consequences of the extraordinary doctrine of Mr. Justice Crampton are droll enough. If it should happen, for instance, that the "Freeman's Journal," which was given in evidence upon the trial of Mr. O'Connell, should contain a libel upon a private individual, that individual would have a right of action against Mr. O'Connell, who, according to Mr. Justice Crampton, is responsible for the contents of the paper; and upon the trial of that action, the publication by O'Connell of the libel would be proved by first proving the conspiracy between Gray and O'Connell, and then the publication by Gray alone.

It appeared upon the whole matter, that Mr. Justice Crampton was of opinion that the application for a new trial ought to be granted as to the

Rev. Mr. Tierney*, whilst Mr. Justice Perrin thought that the motion ought to be conceded as far as concerns Mr. O'Connell also. The Lord Chief Justice, "on the other side," was of opinion that the rule ought to be refused as to all the traversers; and the opinion of Mr. Justice Burton was in accordance with the judgment of the Chief Justice. The combined effect of the judgments of Messrs. Crampton and Perrin, taken together, was therefore that Mr. Tierney and Mr. O'Connell ought to have a new trial. And Mr. Justice Crampton entertained so strong an opinion about the injustice and illegality of the verdict against Mr. Tierney, that he threatened to consent to a new trial being granted to all the defendants, unless the Attorney-General entered a *nolle prosequi* in favour of Mr. Tierney. In deference to this recommendation of Mr. Justice Crampton, a *nolle prosequi* was entered with regard to Mr. Tierney. It is unnecessary to add that no regard was paid to the opinion which Justice Perrin had expressed in favour of Mr. O'Connell. Yet nothing in the world can, we think, be more clear than that Mr. O'Connell was entitled to a new trial upon the ground already mentioned, namely, the admission in evidence of the "Freeman" and the "Pilot," for the purpose of proving that Mr. O'Connell spoke the speeches,

* In reference to a meeting at Clontibret, evidence was received at the trial of a conversation alleged to have taken place between Mr. Tierney and a policeman two months before the meeting was held.—*A. & T.* 262.

and attended the meetings therein represented to have been attended and spoken. The newspapers, having been published by Gray and Barrett, were admitted against Mr. O'Connell as evidence of the truth of the statements which the papers contained concerning the conduct and acts of Mr. O'Connell, and as evidence of the truth of the relations which they contained of antecedent events. The instance was the very first in which a newspaper had ever been given in evidence in such circumstances for such a purpose. What amount of propriety there was in admitting it upon the recent occasion will appear by the following extracts from the latest (Mr. Amos's) edition of the first volume of Mr. Phillipps's "Treatise on the Law of Evidence," pp. 210—212.

"Any writings or verbal expressions *which are acts in themselves, or accompany and explain other acts, and are, therefore, part of the res gesta*, and which are brought home to one conspirator, are evidence against the other conspirators, provided that it sufficiently appear that they were used in the furtherance of the common design.

"For the same reason, declarations and writings explanatory of the nature of the common object are receivable in evidence, *provided they accompany the acts done in the prosecution of such object, arise naturally out of those acts, and ARE NOT IN THE NATURE OF A SUBSEQUENT STATEMENT OF THEM.*

"But where words or writings *are not acts in themselves, nor part of the res gesta, but a MERE RELATION OF SOME PART OF THE TRANSACTION, OR OF THE SHARE WHICH OTHER PERSONS HAVE HAD IN THE EXECUTION OF THE COMMON DESIGN, the evidence is not in its nature original. It depends upon the credit of the narrator, who is not before the Court; AND IT CANNOT therefore BE RECEIVED.*"

These passages are abundantly sufficient to show the impropriety of admitting the papers in question for the purpose for which they were admitted; and the most extraordinary fact connected with the decision of the Court upon this point, is the little or no degree in which the majority of the judges appear to have adverted to the plain and palpable distinction which is made in the extracts, and which had been so distinctly pointed out to their notice in the judgment of Mr. Justice Perrin.

That this motion, if addressed to any of the Courts at Westminster Hall, would be granted, is perfectly clear as a matter of general principle. There occurred, however, at the period in question, a case in the Court of Queen's Bench in this country, which demonstrates in so complete, and we may add, so confounding a manner, the gross impropriety of the decision of the Court of Queen's Bench in Ireland, that we cannot abstain from here inserting the case, that of *The Queen v. Blake and Tye*, as it was reported in the London papers of the 31st of May last year: —

The defendants had been indicted for having conspired to defraud the revenue, by causing goods to be delivered out of the Queen's warehouse without paying the whole of the duty, and amongst the documents tendered in evidence against Blake at the trial, were certain entries made by Tye, in his own ledger, together with a sort of account, stated by him upon one of the butts or counterfoils of his

check-book with his banker. The first class of entries contained accounts of the successive deliveries out of the goods in the course of the several stages of the transaction, as well as a statement of Blake's name, as the Custom-house officer who was concerned in aiding the delivery, the entries being contemporaneous with the deliveries which were so entered. The account upon the counterfoil stated, along with other matters, that Blake was entitled to a sum of eighty-two pounds, as his share of the produce of the fraud. Mr. Cockburn, at the trial, objected to the reception of either of these documents as against Blake, but Lord Denman allowed both to be read. The defendants having been found guilty by the jury, Mr. Cockburn upon a subsequent occasion obtained a rule *nisi* for a new trial, and cause was shown against it afterwards by the Solicitor General and Mr. Pollock. The Court, however, without any hesitation, and *without even thinking it necessary to hear Mr. Cockburn in support of his rule*, unanimously decided that the new trial ought to be granted.

Lord Denman said, that with regard to the entries, the Court had no doubt of the propriety of their admission, as they arose naturally out of the successive steps in the transaction, and were, in fact, a portion of it. With respect, however, to the memorandum upon the counterfoil, it was, in substance, the same as a declaration by Tye, that he had given the money to Blake, and *such a declar-*

ation, according to all the authorities, could not be received against Blake. He, Lord Denman, had so much doubt upon the subject at the trial, that in admitting it, he had only yielded to the pressing instances of the Attorney-General, by whom the prosecution was conducted. He was now, however, clearly of opinion, that, being a statement of one conspirator of the part which another had taken in the conspiracy, it was inadmissible as evidence against the person whose part in the transaction it professed to describe. If the Court were to open a door for the admission of such statements, they would find themselves oftentimes extremely embarrassed by the fact of one conspirator making such a statement about others as should completely exonerate himself, and throw the whole blame upon them. It was quite clear, that a mere statement which one conspirator makes either to a third party, or upon an occasion when he may think proper to act for himself, cannot be received as evidence against any other person charged with participating in the conspiracy.

Mr. Justice Patteson concurred entirely in the judgment of Lord Denman, as well as in the grounds of it, and stated that in the cases which had been relied upon by the Solicitor-General (and which were the same upon which reliance was placed by the Attorney-General, and apparently by the Court of Queen's Bench, in Dublin) the distinction laid down in the text-books between declarations accompanying the acts of the conspirators, and *subsequent*

statements of antecedent events, had been particularly preserved and acted upon.

Mr. Justice Williams and Mr. Justice Coleridge expressed the same opinion, considering it to be perfectly clear, upon *acknowledged principles*, that *no subsequent statement by one conspirator, of an antecedent event, was receivable in evidence to affect another.**

From this judgment, it is perfectly clear that the new trial, which was refused in Dublin by a majority of three judges to one, would have been conceded at Westminster, *without argument*, by a majority of four to nothing; and that the Irish decision against the new trial may be said, therefore, to rest upon the authority of three judges out of eight, whilst it is totally destitute of any support or countenance from any principle, or any case or any writer whatever.

Having been charged, tried, and convicted in the monstrous manner which we have mentioned, Mr. O'Connell came up to receive the sentence of the Court upon the 30th of May, when there was presented the most extraordinary exhibition that had been theretofore made, even upon this very extraordinary trial. Mr. Justice Burton, who officiated upon the part of the whole tribunal upon the occasion, observed that "the Court felt that it ought not to

* The case was down for hearing during the sittings after last Hilary Term, at Guildhall, but was withdrawn by the Crown.

“ be led away by *feelings of indignation*, nor by any
 “ *desire to inflict punishment for punishment sake*,
 “ but to bring their minds to the subject free from
 “ external influence. For himself, and *he thought*
 “ *he may add* for all the Court, he was sure that
 “ their minds *had been brought* into exactly the
 “ proper state to consider the case.” It certainly
 was worth while to commemorate in a special man-
 ner the fact that the Court, after the conviction of
 the defendants, and upon the arrival of the catas-
 trophe, *had been brought* into the sort of judicial
 temperament which seemed necessary to secure a
 calm and impartial decision. The misfortune of
 the matter is that the learned Judge immediately
 afterwards proceeds to make a statement which, as
 far as it is intelligible at all, seems very decidedly
 to negative this desirable condition of complete im-
 partiality. His Lordship says, “ We are bound to
 “ award punishment of an exemplary kind ; but, at
 “ the same time, determined not to suffer any *opinion*
 “ *of our own as to the offence to guide us in the sen-*
 “ *tence*, but strictly to examine and conclude upon
 “ the character of that offence.”

The multitudinous meetings constituted of course
 the principal topic of his Lordship's address ; and
 he did not fail to make upon this subject, as the
 Chief Justice had previously done, several assertions,
 which denoted the most entire oblivion of the evi-
 dence which had been given, or the most complete
 contempt for it. Mr. Justice Burton observed that

the meetings in question "*must necessarily have been attended with great terror to all the Queen's subjects in the neighbourhood in which the assemblages took place.*" Upon this subject it shall suffice to remind the reader once more, not only that all the evidence which was given upon this point, expressly and directly proved that *no alarm was excited* — much less any TERROR — in the neighbourhood by the meetings; but that it was upon the very ground of those assemblies NOT causing any apprehension in the neighbourhood, for either person or property, that the Solicitor General justified the conduct of the Government, in having indicted the defendants for a conspiracy, instead of charging them with attendance at illegal assemblies. The Solicitor General stated, after all the evidence in the case had been given, that if any separate meeting had been made the subject of an indictment for illegality, such prosecution would be triumphantly answered and deservedly defeated by the fact that *no alarm whatever* was excited by the meeting in the neighbourhood where it took place, or anywhere else. Yet Mr. Justice Burton asserts, that the meetings must have produced not alarm only but terror—an assertion which he must have known, and which every one else knew, to be directly and expressly contradicted by the evidence which was given upon the trial — by the case which was made on the part of the prosecution by the law-officers of the Crown; and by the very case made against Mr.

O'Connell even by the Chief Justice himself.* In the same manner, showing as little regard for the state of the record in one case as he had shown for the evidence in the other, his Lordship observes, "the main offence imputed to the traversers is, that of attempting the abolition or abrogation of the legislative union, as at present subsisting, by means of a conspiracy, which is alleged by the indictment, and has been so found by the jury, as formed by them, with the intention to intimidate the subjects of the Queen who are opposed to such a measure:" and elsewhere he calls it, "a conspiracy to abolish the legislative union, by means of the intimidation caused to various branches and bodies of her Majesty's subjects."

Upon these assertions we shall trouble the reader no further than by reminding him, that the indictment contained no mention of any subjects of Her Majesty, whether opposed to the Repeal of the Union or not, who were to be intimidated by the exhibition of physical force at the meetings, much less of any particular "branches and bodies of Her Majesty's subjects." The English judges, in declaring the charge upon the record about the physical force at the multitudinous meetings to amount to nothing at all, expressly and in a very remarkable manner, as the reader has already and frequently seen, drew the attention of the House of Lords to

* *Suprà*, p. 181. "Not for the purpose of terrifying the neighbours"—"but for an ulterior and more remote object."

the fact, that the charge in question contained no statement of the sort of intimidation intended to be alluded to, nor any allegation as to the persons, if any, who were to be the objects of it; nor any allegation that the physical force was used, or threatened, or intended to be used against any body whatever.

To give a peaceful character to the meetings answered the purpose of the Crown in the circulating sophistry by which they attempted to make a juggling justification for their conduct in adopting the cumulative, circuitous, and constructive prosecution to which they had recourse for the purpose of attempting to establish the illegality of meetings, the character of which they did not dare to assail by any direct imputation which was known to the law, or upon which any specific issue might be distinctly placed before a jury, and correctly estimated by the public. When, however, the sentence was to be pronounced, it was felt of course that it would be rather too glaring an iniquity to inflict actual punishment in hypothetical reference to "ulterior" contingencies and "remote" futurities, and then it became necessary to give a character to the meetings in direct opposition to the whole evidence in the case, and indeed in the directest opposition to the fundamental theory of the very case itself. Having already entered with some degree of minuteness into the consideration of the several portions of the

conduct which was attributed to the defendants, and alleged to be illegal, and having, as we conceive, demonstrated very satisfactorily that such actions were in some instances meritorious, in others not illegal, and in any event that they were only what the same individuals had for many years before been in the habit of doing, and what hundreds of other persons have been and are now in the habit of doing without any imputation of illegality, we believe that the reader will agree with us in thinking that the punishment inflicted upon Mr. O'Connell by fine and imprisonment was extravagantly severe, and that notwithstanding the assurance given by Mr. Justice Burton that the Court *had been brought* into a state proper for the impartial consideration of the subject from some other state less proper for the performance of such a duty; yet there is reason enough to believe that those "feelings of indignation," to which the learned Judge alluded as being so unfit to influence the conduct of their lordships in apportioning the punishment, had not been so totally suppressed as their lordships themselves appeared to suppose.

The most important of the language called seditious used by Mr. O'Connell was said by the Chief Justice to be seditious nonsense, although it had been previously uttered by Saurin, Plunkett, and Bushe. The language in which he was said to have endeavoured to excite hostile feelings in the people of Ireland against the people

of England, exhibits not the tenth part of the violence with which at the very same time thousands of individuals, and dozens of societies, were endeavouring to excite hostility in the people of England against the people of Ireland. The language used in reference to the soldiery we have shown to be the same which expresses the principles of moral science upon that subject, whilst the Chief Justice declared that as a matter of fact there was no evidence that the papers in question, whatever may be their character, had ever come into the hands of any individual soldier. No part of the evidence appears to be in a peculiar degree applicable to the charge of intimidating the legislature by speeches and writings, which is contained in the eleventh count, and the charge itself upon that record is contradictory and absurd, as the whole of the prosecution went upon the ground that the defendants combined to effect the repeal of the Union, *not* through the medium of an act of the Legislature, but by the application of some other means. The Chief Justice expressed this view of the case half a dozen times over in the course of his address to the jury. The only remaining part of the charge was that of setting up the Arbitration Courts, of which we have sufficiently disposed already, and in respect of which the evidence proved that the two defendant-arbitrators, Mr. John O'Connell and Mr. Gray, had assumed cognisance of *one* cause, in which the only judicial act

which they performed was that of adjournment, and which seems to have been as real a piece of litigation as that represented by Homer as having been represented by Vulcan upon the shield of Achilles. After having sentenced Mr. O'Connell for his share in these offences to suffer imprisonment for twelve months, and to pay a fine of 2000*l.*, Mr. Justice Burton proceeded to direct that he should give security to the extent of *ten thousand pounds!* that he would keep the peace for seven years. This last part of the sentence is so incredibly absurd, and is shown by the Court itself to be so unjustifiable, that we should suppose there existed some mistake in the report, if we saw any ground, however slight, for believing in such an error. It is scarcely credible—one can with difficulty believe, upon even the testimony of one's own eyesight—it is, however, an indubitable fact, that this very judge, who sentenced Mr. O'Connell to give security to the extent of *ten thousand pounds!* that he would keep the peace for seven years, actually declared in the same judgment, within one minute before, that numerous and multitudinous as the Repeal meetings had been, *they had not exhibited* A SINGLE INSTANCE OF A BREACH OF THE PEACE. That this absence of a single breach of the peace, in the course of a political agitation, which was accompanied with unparalleled excitement, and in which millions of the peasantry participated for a

- period of several months, was *the result of the pacific influence exercised by Mr. O'Connell*, that he himself [the Judge who sentenced Mr. O'Connell to give security to the extent of *ten thousand pounds*, that he would keep the peace for seven years] believed — that he, *the Judge himself*, believed — that it was the intention of Mr. O'Connell to carry the Repeal of the Union WITHOUT ANY INFRACTION OF THE PEACE, AND WITHOUT SHEDDING A SINGLE DROP OF BLOOD; that he, the Judge, was convinced that Mr. O'Connell had this determination TO PRESERVE THE PEACE *firmly fixed in his mind*, and that it was the great influence which he possessed over the parties who joined him, that enabled him to preserve the peace unbroken. His lordship went on to refer to the continual declarations of Mr. O'Connell, that he would abandon the people to themselves, *if they committed any violation of the peace*; and that *no violation of the peace would ever be committed with his consent*. Having referred to these passages, his lordship declared his belief that all the expressions which he had cited showed how very anxious was Mr. O'Connell's desire for the PRESERVATION OF THE PEACE, "and whether," said the learned Judge, "Mr. O'Connell had expressed "such desire or not, THE PRESERVATION OF THE "PEACE WAS THE CONSEQUENCE OF ALL THAT HE "SAID AND OF ALL THAT HE DID."

Could any man — *can* any man, believe that the Court of Queen's Bench, after having thus

deliberately expressed their own judgment upon the pacific nature and consequences of Mr. O'Connell's principles, recommendations, and conduct—after deliberately declaring that, throughout the whole period of the recent agitation, *he had preserved the peace inviolate, in a continuance of circumstances which, in the judgment of the Court, had a tendency to the generation of TUMULTUOUS OUTRAGE*—can it be believed, that the same Court should, in the same breath, direct Mr. O'Connell to give security to the extent of ten thousand pounds, that he would not, for the next seven years, violate that peace *which he was not even charged with violating, or intending to violate; which the Court itself declares that he has never violated, but has always preserved, and will preserve to the end of his life.* Mr. O'Connell is sentenced to the *present* punishment of being obliged to find and give security to the amount of TEN thousand pounds, upon the contingent possibility that, peradventure, upon some *future* occasion — *nobody knows when* — some other person — *nobody knows who* — *may* commit, *in spite of Mr. O'Connell*, an offence which the judges who sentenced Mr. O'Connell declare that *he will never commit*, nor allow any one else to commit if he can prevent the commission. And in reference to this future offence, to be possibly committed by *some other person in opposition to Mr. O'Connell's efforts at preventing the commission*, Mr. O'Connell and others (his sureties) are bound

to enter into recognisances upon which it would be ridiculous to suppose that either the sureties or the principal *could ever be made responsible*, even *supposing the offence to be actually committed* in the circumstances contemplated and described by the Court itself! The wanton, flagrant, self-contradictory iniquity and absurdity of this part of the sentence, transcends all capacity of description, and cannot fail to be received with indignation by every person whose sentiments are sufficiently elevated to render him more solicitous for the rational administration of justice, than the gratification of political or personal hostility.

When this administration is pure, enlightened, and unimpassioned, it becomes what it was intended to be, the principal support of civil society, and secures the willing obedience and cordial veneration of the community which reposes under its protection. The administration of justice, however, like all other human institutions, depends, not only for its efficiency, but for its very existence, upon the opinions which are entertained about it by the judicious, the instructed, and the impartial members of the community; and these opinions are directed to the conduct of the parties by whom the tribunals are put into motion, as well as to that of the tribunals themselves.

That feelings of such a nature as we have mentioned should in a peculiar degree find a place among the members of the profession of the Bar,

was of course to be expected ; and we cannot be surprised, therefore, at the following description of the scene which occurred in the Irish Court of Queen's Bench, when Mr. O'Connell came up to receive the sentence of the Court. The following account of this extraordinary and unprecedented occurrence is taken from the "Times" of the 1st June, 1844 :—

"All the barristers present at the time in Court, with the exception of *comparatively few*, rose and greeted Mr. O'Connell, upon his entrance, with loud and repeated rounds of cheers, accompanied with clapping of hands. This demonstration of acclamation continued for a few minutes, and as it seemed to become louder, it was evidently joined in at the close by a great many who had not ventured to do so at the beginning. Indeed we are informed that many of the barristers who joined in that singular display of feeling ARE NOT THE POLITICAL PARTISANS OF MR. O'CONNELL. WE MAY ALSO OBSERVE, THAT THE DEMONSTRATION SEEMED TO BE CONFINED TO THE MEMBERS OF THE BAR."

This extraordinary excitement and sympathy among the members of the Irish Bar, and especially among the *political opponents* of Mr. O'Connell, is perfectly intelligible. Accustomed as they are to the daily administration of justice, and deeply sensible as they must consequently be of its infinite importance, they had been shocked at beholding some of its most fundamental principles violated in the trial of Mr. O'Connell. They had seen eight or nine defendants overwhelmed in a body by an act of accusation so multifarious in its character, and containing such a multitude of

heterogeneous imputations, that the copy of it occupies a moderately bulky volume of the octavo size. They had seen the defendants tried upon this interminable accusation by a jury which was most unquestionably and effectually packed, whether through accident or fraud. They had seen a new trial refused, in circumstances in which they must have considered that it ought to be granted as a matter of right. They knew that all these occurrences constituted an example equally dangerous to all men of all parties, and they felt that what was the case of their political adversaries to-day, may be their own case to-morrow. They must have believed that whatever may be said about the separate overt acts imputed to Mr. O'Connell, the charge of conspiracy was untrue, and, in the circumstances, actually ridiculous; and however, therefore, they may have rejoiced to see Mr. O'Connell convicted upon an indictment rendering him directly and solely responsible for a distinct, substantive, palpable, and intelligible offence, they revolted from the notion of punishing him for a conspiracy, of which they probably did not believe him to be guilty, and of which he expressly deposed upon his oath, as did every other defendant, that he and they were jointly and severally and totally innocent.

This feeling could have scarcely been diminished by the combination of excessive severity and essential absurdity by which the sentence was distin-

guished. We accordingly find that when Mr. O'Connell protested his innocence of the offence imputed to him, and declared that justice had not been done, loud cheers broke from all parts of the Court. The judges, but particularly the Chief Justice, looked around them as if utterly confounded by this outburst of professional and popular feeling. The cheering was continued for a few minutes, and as it was about to subside, was again renewed in obedience to the call of "one cheer more." Such was the vehement, uncontrollable, and most decisive assent which was given by Mr. O'Connell's own political antagonists to the truth of his declaration, that "justice had not been done" to him.

A writ of error having been sued out, the case was brought before the House of Lords, where the principal questions were, the correctness of the interlocutory judgment, allowing the demurrer to the plea in abatement; the propriety of the other interlocutory decision overruling the challenge to the array; and the validity of the final and general judgment in the form and circumstances in which it was entered up, and in reference to the grounds upon which it was, or professed to be, supported. The judges were summoned to assist the House in its deliberations, and before the final judgment was delivered gave written answers to certain questions which were proposed upon the part of the House, and to which we shall more particularly

advert, according as there shall be occasion to do so.

Upon the subject of the challenge to the array we have already inserted the greatest portion of the masterly and invaluable observations of Lord Denman, to which it would be as “wasteful and “ridiculous excess” to add any observations of our own, as “to gild refined gold, to paint the lily, or “throw a perfume on the violet,”—even if we possessed, in a more considerable degree than we pretend to possess, an acquaintance with the art of argumentative and oratorical perfumery and gilding. To the arguments of his Lordship we therefore commend the reader once more, being convinced that to whatever political party he may belong, yet if he be adequately imbued with the love of impartial justice in general, and with admiration for the provisions which have been made for the purity of its administration under the British constitution in particular, the noble address of Lord Denman will not only please upon a second perusal, but that

“*Decies repetita placebit.*”

The question which arose out of the judgment upon the plea in abatement, and upon the error assigned in reference to the subject of the plea, will be sufficiently understood from a perusal of the following summary of the law and of the facts connected with that part of the case : —

The 56 Geo. 3. c. 87. recites, “that a practice

“ prevailed in many of the grand juries in Ireland
 “ of finding bills of indictment *without examining*
 “ *any witnesses for the Crown !* ” And after a short
 interval goes on to provide, “ that from and after
 “ the passing of that act *no bill shall be returned a*
 “ *true bill by any grand jury in Ireland* unless the
 “ same has been found by the jurors upon the
 “ evidence of one or more witnesses, sworn in court,
 “ and produced before the grand jury.”

The immediate effect of this act of parliament was to establish by statute in Ireland the practice which had been established by the common law in England. The statute in the former country was, however, more stringent than the usage was here. For whereas there existed *some* grounds for believing that a grand jury in England *may* find a bill of indictment without the testimony of one or more witnesses who had been sworn in open court, the Irish act of parliament *expressly* PROHIBITS *the jury* FROM FINDING *any bill in such circumstances*. From the nature and construction of such provision it inevitably results, not only that any bill which may be found in the manner prohibited by the statute would be an absolute essential nonentity, but that the jury in finding it would be guilty of an actual violation of the law. Upon the passing of the act it immediately became the practice to swear the witnesses exactly in the same manner as in this country, and the proper officer always authenticated the circumstance by a memorandum in the following

form, which was placed upon the back of the bill :
 “ JOHN SMITH, WILLIAM BROWN, HENRY JONES, and
 “ CHARLES ROBINSON, four witnesses sworn in open
 “ court. — John Reynolds, Crier.” So that the indictment contained upon itself the evidence of its having been returned a “ true bill ” according to the provisions of the act of 1816.

The 1 & 2 Vict. c. 37. recites the passing of the act of 1816, and recites the recital of that act :
 “ That a practice had prevailed in many of the
 “ grand juries of Ireland to find bills of indictment
 “ without examining witnesses for the Crown.” It then goes on expressly to recite the part of the former act which *absolutely prohibits the finding of any bill to be a true bill* in such circumstances. It then recites that the other parts of the provisions of the former act had been found most salutary, “ but that the administration of the oath *in court* “ had been found to be productive of delay, &c.” It then goes on to enact that *before the examination* of any witness the foreman or *other member* of the grand jury shall administer to him the oath required by law ; and that the foreman or *other member* who should have administered such oath shall upon the back of the bill endorse the name of the witness so sworn by such member, “ *and AUTHENTICATE the same by his signature or initials.*”

Since the passing of this latter act the witnesses have been sworn in the grand-jury room, and by the members of that body ; and as the evidence,

which was formerly afforded by the memorandum of the officer that the witnesses had been sworn according to law, could not possibly exist any longer in that shape, the legislature directed that whatever member of the jury should happen to administer the oath to a witness should, with his own hand, upon the record *authenticate* the fact of his having done so. With regard to this matter it appears, beyond controversy, to have been the object of the legislature that the bill itself should contain *intrinsic evidence* of its having been found in the manner which was required by the law; and the legislature not only considered that the method enjoined by the statute produced the most *authentic* evidence of the fact, but the only evidence which the legislature contemplated upon the subject—the sworn secrecy of the grand jury proceedings preventing the possibility of the existence of any other evidence of an *authentic* or official character.

It appears in the present case that the *indictment contains* NO ENTRY OR MEMORANDUM, GREAT OR SMALL, *of the kind, which is imperatively required by the statute, in order to the validity of the indictment itself.* It has the appearance of an indictment found before the act of 1816, and in the vicious and illegal manner which it was the *declared purpose of that act to PROHIBIT for all future time.* It contains not, in short, *any trace of any evidence* to show that it has been found in the *manner which the law requires*; that is to say, it *contains no evidence what-*

ever that it has ever been LEGALLY or sufficiently found at all.

Such being the state of the facts upon this point, the following "information" was given to the House of Lords by the judges in this country : —

" And with regard to the error in fact assigned
 " by the defendant Thomas Steele, it is manifestly
 " founded on a part of the section that is directory
 " only, and not essential. *The oath must have been*
 " *already administered* (which is the essential part
 " of the enactment) before, in the language of the
 " statute, '*the foreman* who shall have administered
 " the oath' is directed to state the name of the
 " witnesses sworn, and to authenticate the same by
 " his signature, or initials, *that is, before the objection*
 " *above made can possibly arise. As a matter of con-*
 " *venience at the trial, in order to ascertain at a glance*
 " *whether the witness examined before the crown jury*
 " *was one of those who appeared before the grand*
 " *jury, such direction ought undoubtedly to have been*
 " *complied with; but it cannot be the law that*
 " *after the witness has been duly sworn and examined,*
 " *and the bill returned a true bill upon his evidence,*
 " *it can be deprived of its legal operation and cha-*
 " *racter by reason of the foreman of the grand jury*
 " *having neglected to comply with such direction*
 " *of the statute.*"

It is difficult to treat this kind of reasoning with the respect which is due to the persons by whom it was used. In delivering the opinions of the judges

upon the Sussex Peerage case, the Lord Chief Justice, in speaking of the Royal Marriage Act, said that its language was precise, and unambiguous, and its intentions clear and unmistakeable. The very same observation may, with even more truth, be made concerning the statutes now under consideration — the object of both of them being, in the language of Chief Justice Pennefeather, to remedy a “prevalent evil pervading the administration of justice in every part of Ireland.”* Now we have always understood it to be an invariable rule that “where a statute directs a thing to be done for the sake of *justice*, even the word ‘*may*’ means the same as the word ‘*shall*.’” so if a statute says that a thing *may* be done which is for *the public benefit*, it shall be construed that it *must* be done.† In the Queen v. Price‡, it was held by the Court of Queen’s Bench in England that an indictment would lie against an officer who refused to obey an injunction in a statute relating to a matter of *public concern*. So that if the expression were in form *only permissive*, instead of being as it is, *directly mandatory*, yet as the matter is of *public importance*, and concerns the *administration of justice*, the provision would impose an obligation with which it would be indispensable for the jurors

* Page 63.

† Dwarria on Statutes, 712. R. v. Barton, 1 Salk. 609. R. v. Flockwood, 2 Chitty R. 251.

‡ 11 Ad. & El. 727.

to comply, in order to give validity to the finding of the indictment. We are sorry to be obliged to observe that the language in which the opinion of the judges is expressed upon this part of the case demonstrates the very slight and superficial attention which they bestowed upon the point. The Chief Justice assumes twice over that the oath can be administered by the foreman only; whereas the statute expressly provides, as will be seen, that it may be administered by *any member*, "provided that he as well as the foreman shall authenticate that fact by his signature or initials." The Chief Justice observes that "the oath *must have been already administered* before this objection can arise;" but what means are there of ascertaining *whether it has been administered or not* if the writing of the name or initials be not obligatory. His Lordship goes on to say, "that as a matter of convenience at the trial," &c. But it is perfectly obvious that the statutes in question had no view at all to any thing which may happen at the trial. Their declared purpose was to *prevent a trial* upon any indictment which had not been found in the manner therein commanded, and to provide that every indictment, before it came to be tried, or *even found*, should contain upon itself "authentic" evidence of the fact that it had been found according to law—*there being no means whatever of ascertaining that it was so found* except the means which the statute itself provided, but *which this decision has abolished*.

In the same spirit of assumption the Chief Justice goes on to say that "it cannot be the law that "after the witness has been duly sworn and examined, and the bill returned a true bill upon his evidence, it can be deprived of its legal operation and character." But the Bill can have no "legal operation or character" unless the witness has been so sworn; and the *decision of the Chief Justice has annihilated the only means of ascertaining whether he has been so sworn or not.* One consequence, therefore, evidently and inevitably flows from the decision, namely, that there is now nothing to prevent grand juries in Ireland from returning bills to be true bills *without swearing any witnesses whatever*, that is to say, to prevent them from *doing in FACT* what the statutes of the 56 Geo. III. and the 1 & 2 Victoria *expressly prohibit them from doing in LAW*; and these two Acts of Parliament, which were passed, according to the statement of Chief Justice Pennefather himself, to remedy "a prevalent evil pervading the administration of justice in every part of Ireland," are *virtually repealed*. Nobody who knows anything about the grand juries of Ireland will attempt to set up in their favour any presumption founded upon either law or fact, of their discharging their duties with propriety and in conformity to the law. Such presumption, if advanced in the present case, would be immediately annihilated by the statutes themselves, which expressly and very truly

recite that it has been the custom of those bodies to do not right but wrong.

Although we have already* entered at some length into the conduct of the Crown and of the Court of Queen's Bench in refusing, pertinaciously if not perversely, to allow the defendants to have a list of the witnesses who appeared before the grand jury in support of the bill, yet we cannot help again adverting to that subject in this place. The reader will perceive, upon referring to the language of the judges, in the decision which we have been just now examining†, that they expressly assume that the defendants *had* a list of the witnesses. Such would unquestionably have been the case in this "realm of England Proper." In Ireland, however, "they manage these things" differently; and not only did Mr. O'Connell remain ignorant, until judgment was pronounced against him, of the names of the persons upon whose testimony the grand jury had found the indictment, but the solicitors for the defence were not even allowed to look at the back of that instrument.‡

There only remains for consideration the third of the grounds of error which we have mentioned above, in respect to which we shall consider it sufficient for our present purpose to remind or inform the reader that the immediate subject for

* *Suprà*, p. 122., &c.

† *Suprà*, p. 242., line 6., &c.

‡ Affidavit of the attornies, printed by order of the House of Commons, 19th June, 1844.

consideration was the validity of a judgment which was expressed in general terms upon the whole of an indictment containing six different offences charged in good counts and bad, in a case where a separate verdict of guilty was found and entered upon each of the counts, good and bad ; where the verdict was illegally found and entered upon some of the good counts, and where, to use the language of the record, " the court, having *fully* " seen and understood *all and singular the premises,*" awarded a certain punishment against the defendant " for his offences aforesaid," and where the quantum of the punishment was a matter for the discretion of the court. It was agreed upon all hands that the judgment ought to be reversed if the punishment were actually awarded upon all the counts, bad and good, and if the words " his " offences aforesaid " must be understood to mean all the offences alleged in fact against the defendant upon the record. The majority of the judges, however, decided that the court below must be taken to understand the difference between the good counts and the bad ; that, as they would unquestionably have given a wrong judgment if they had given any part of it either in reference to the bad counts, or the counts upon which there were bad findings, it must be presumed that they gave the entire upon the counts which were good in themselves, and upon which the verdicts were legally found and entered ; and that the words " for

“ his offences aforementioned ” must, therefore, be understood as not meaning all the offences which had been mentioned before, but only such part of them as was alleged in the good counts, and supported by legal and appropriate findings, legally and properly entered, and as rendered the defendant liable, in law, to the punishment which was awarded by the Court. Such was the decision of the seven judges upon what may be called the construction of the record ; and they stated, in further confirmation of their own view, that it was in conformity with a general *impression* which has prevailed upon the subject in question from the time of Lord Mansfield to the present period.

With regard to the wonderful presumption of the infallibility of the Irish Court of Queen’s Bench, we think it sufficient to say that it was demolished, in the very moment of its creation, by the very judges who made it, and who unanimously decided that certain counts in the indictment, which the court below declared to be unexceptionably good, were most unquestionably bad ; whilst we find, from the authenticated accounts of the proceedings of that court, that the assumption by the judges in England that the judges in Ireland had pronounced their judgment only upon the good counts, was loudly, repeatedly, and most copiously contradicted by the Irish judges themselves. The question remaining for decision, therefore, was, what foundation there existed, in reason, authority, or propriety, for the general *impression* that such a judg-

ment as the one under consideration was correct ? The question upon this point, in other words, was, how far the general *impression* to which we have alluded was to be considered as a practical and authoritative exemplification of existing law ? About the actual *existence* of the *impression* there was little or no question ; and Lord Denman and Mr. Baron Parke expressly stated that they entertained it up to the moment of entering the House. This was the position of the case and of the argument at the instant when the Lord Chancellor moved, in conformity with the opinions of the seven judges, that the judgment be affirmed. It is superfluous to say that his Lordship's address was an able one. But we confidently appeal to all persons who have the capacity to judge of such matters, whether every part of it was not either an assumption or an abandonment of the whole matter which was *really in controversy*. He takes for granted the infallibility of the Court of Queen's Bench, and concludes, as the English judges had done, contrary to the authenticated and unquestionable fact, that the Irish judges awarded the punishment upon the good counts alone.

We shall take leave to cite, in reference to this point, the opinions which were delivered by the judges of the Queen's Bench upon the 29th of May, in refusing the motion which had been made to arrest the judgment. The Chief Justice declared that the act of attempting to *effect intimidat-*

tion by the EXHIBITION OF GREAT PHYSICAL FORCE at the MONSTER MEETINGS, EXCEEDED IN AUDACITY EVERY OTHER PART of the conduct which was charged upon the defendants. Mr. Justice Crampton expressed himself in the most vehement language against the *assembling of multitudinous masses*, for the purpose of producing intimidation, in the manner complained of in the indictment. Mr. Justice Perrin called the offence a "very high misdemeanor," and said that it was *nothing short of threatening insurrection* to attempt to intimidate the Government by the *assembling of multitudinous masses and the display of GREAT PHYSICAL FORCE*. Upon the next day, Mr. Justice Burton, in pronouncing the sentence of the Court, observed that "the MAIN PROCEEDINGS which were charged against the defendants were the ASSEMBLING OF VAST MULTITUDES for the purpose of overawing the Government and other persons, through the intimidation to be produced by the EXHIBITION of GREAT PHYSICAL FORCE." The learned Judge merely alluded to the other parts of the charge, and then proceeded to pass sentence for the offence which, adopting the language of Mr. Justice Perrin, he called a "very high misdemeanor." Nothing can be, therefore, more clear than that almost the WHOLE PUNISHMENT was inflicted for the offence of *procuring intimidation by the exhibition of great PHYSICAL FORCE*. Now in the 5th, 8th, 9th, 10th, and 11th, which are the only surviving parts of the indictment,

*there is no charge whatever of causing intimidation by the EXHIBITION OF GREAT PHYSICAL FORCE; and the consequence is, that Mr. O'Connell has been actually imprisoned for three months, and sentenced to pay a fine of 2000*l.*, upon the supposition that he was guilty of an offence of which there was no legal or valid allegation upon the record of his conviction.*

Such was the state of the facts at the instant when the Lord Chancellor moved the House of Lords that the judgment of the Court be affirmed. We shall now proceed to examine the grounds of this motion, and we venture to hope that we shall demonstrate that they are totally and evidently inadequate even to give a colour to the confirmation which he proposed.*

The Lord Chancellor says, that, in a civil case, the record is always examined, in order to see that the verdict is entered upon such counts as are valid in law, and capable of supporting the judgment, but that *no such thing is ever done in a criminal case*, in which latter instance the verdict is entered *as a matter of course, without ANY REGARD to the SUFFICIENCY or INSUFFICIENCY of the counts* — the foundation of this practice, both negative and positive, being, according to his Lordship, “that it has “always been considered in the profession that “any number of defective counts in the indictment “cannot affect the judgment, provided there be one “good count upon the record to sustain it.” Let

* Judgment, p. 2.

us examine the tenor, estimate the value, and ascertain the consequences of this argument or assertion, whichever it be.

First, as a matter of fact, the record having a good count is never, as it seems, any farther examined in the court below, because—secondly, it is considered that one good count will support a general judgment, however numerous may be the bad ones; thirdly, this consideration is founded upon the principle that the court below awards no punishment at all upon any of the counts that are either ill framed or ill found, but assigns the whole to such as are good in both those respects; which principle of necessity involves the presumption that—fourthly, the Court not only is infallible in discriminating between good and bad counts and findings, but that it puts its infallibility into actual operation by inquiring into the quality of the counts and findings, for the purpose of distributing the punishment, and that it therefore *invariably examines the record before pronouncing the judgment—that it INVARIABLY does what the Lord Chancellor asserts as the foundation of his argument that it never does at all!* Starting with the Lord Chancellor along the line of the argumentation from the position of fact, that the record *is never examined* by the court, we find ourselves, under the conduct of his Lordship, actually arrived at the conclusion that the record *is invariably examined* by the court. The *fact* of the record *never being examined* in the court

below is assigned as a proof of the existence of the general *impression* that the judgment is good, whilst the goodness of the judgment rests, as a matter of reason, upon the presumption that, first of all, the court below is infallible in discriminating between good counts and bad; secondly, that it is impeccable, to such an extent, at least, as to exclude the possibility that it should award any punishment upon either bad counts or good counts badly found; and, lastly, that, for the purpose of seeing which counts *are* bad in either of these respects, that examination of the record which the Chancellor declares *never to be made is made universally and invariably*.

Omitting the intermediate links of this odd sort of *sri tes*, the argument in a compressed form is, that the Judges never, in fact, examine the record in *any instance*, because in theory they are presumed to examine it in *all*; and that whereas *if such examination took place* we should be justified in presuming that all the punishment was put only upon good counts well found, we are therefore to take the same thing for granted *though the examination had not taken place*, and although the only foundation assigned for the presumption is the fact of the examination, which examination is declared, in the same breath, never to be made as a matter of fact! The presumption, like every other, can only be justified upon the ground that it is a true expression of at least the ordinary and

general condition of the facts. But it is unlike every other in this extraordinary respect, that, being founded upon the probability of a certain state of circumstances, not only does that state of circumstances *not* exist, but the very reason why it does *not* exist is *because* of the presumption that *it does*! The presumption supports a rule because of the existence of a fact, which fact, contrary to the presumption of its existence, not only does not exist, but is prevented from existing by the presumption of its existence. To call this reasoning in a circle would be an inadequate expression for the contradictory circuitousness of its character, unless we could by the circle understand one which was positive at one side and negative at the other side of a certain point in the circumference of the circle itself.

Again: the Lord Chancellor says, “ Now the judgment is, that the party for his ‘ offences aforesaid ’ be fined and imprisoned. What, then, are the ‘ offences aforesaid ? ’ They are the offences properly charged, and properly found upon this record. Two of the counts are defective, because in the opinion of the learned judges they contain no charge of any offence. There are various allegations in those counts, but they do not constitute any offence known to the law. When the judgment, therefore, refers to the offences aforesaid, it must, according to every rule of legal interpretation, relate only to those counts in

“ which some legal offence is stated, and cannot be
 “ considered to include those which contain no such
 “ charge.” *

For this *methodus interpretandi* the noble and learned lord assigns the following reason, to which we entreat the most earnest attention of the reader.†
 “ If you reverse the judgment upon the ground
 “ that the punishment, or a part of it, was founded
 “ upon a count which is defective, *you may, after*
 “ *you have so done, find that the Judge had taken*
 “ *into his consideration, among other circumstances,*
 “ THAT VERY DEFECT” [of the count] “ *in making*
 “ *up his mind as to THE EXTENT OF THE PUNISHMENT*
 “ *which he felt it his duty to inflict.*” Now at the moment when the Lord Chancellor made this assertion he knew that in the present case the judges of the court below were so far from taking the defect of the counts into consideration that *they deliberately and unanimously declared the defective counts to be* ABSOLUTELY UNEXCEPTIONABLE, and that they were so far from diminishing the amount of the punishment with any reference to the counts in question that it was *for the offence—the only one—alleged in* THOSE VERY COUNTS *that the* WHOLE, *or almost the whole, punishment was* EXPRESSLY *inflicted.* The Lord Chancellor, therefore, expressly founds his argument upon a presumption for which he knows that *there is not a particle of foundation in the case,* and which, on the contrary, he actually knows to

* Opinion, page 3.

† Ibid.

be *diametrically opposite to the fact*. This general presumption, therefore, about examining the counts, and making allowance for the defects, could not imaginably be presented in a more hopeless or desolate situation than that in which it was placed by the Lord Chancellor himself. The question which was raised upon this point at the Bar of the House of Lords was, whether this presumption was entitled to receive the deliberate sanction of the Bench and of the Bar, and to be adopted into the general mass of what may be called the practical law of the country; and in these circumstances the Lord Chancellor contends for the probability of the presumption in a case where *he ACTUALLY KNOWS it to be absolutely and even notoriously contrary to the fact*. So that Lord Lyndhurst's conclusion in favour of the correctness of the judgment is founded upon the existence of an "impression," which is founded — if upon any thing at all — upon an assumption; which assumption Lord Lyndhurst's own argument absolutely proves to be unfounded in general, and which Lord Lyndhurst absolutely knows to be not only unfounded, but in direct opposition to the truth in the particular case before the House.

It may be said that, in arguing the case upon the grounds whereon he placed it, the Lord Chancellor only pursued the method which had been previously adopted by the judges. But we submit that the position of the judges in reference

to the decision was very different from that in which the Lord Chancellor was placed. The judges, at the request of the House of Lords, "informed" the House of what the law of the case would be upon the assumption of the correctness of the impression which had been supposed to prevail in favour of such a judgment as that which had been given by the Irish Court of Queen's Bench in the case of *The Queen v. O'Connell*. But the question which had been raised at the bar of the House of Lords was the *correctness of that impression itself*. That was the question which the Lord Chancellor was called upon to decide as a member of the House of Peers, but which, as we humbly submit, he did not argue at all. That question was then raised upon a writ of error for the first time. Opposite consequences were by the different parties to the discussion drawn from this fact; but all parties agreed about the fact itself, that there had not been any previous instance of a writ of error upon such a judgment as that which was then brought under the consideration of the House.*

* "It is admitted on all hands that this question is *res integra*, as far as decisions are concerned. We must then weigh the principle, and I find it wanting: it is inadequate to support the *loose and censurable practice* which some of the learned judges have described as prevailing. To pass a sentence for *three* offences where a party is *well convicted of only two* cannot be right. And let it be observed, that I do not seek to control a discretion exercised on the proper subjects of that discretion; *I merely hold it wrong to punish in a case*

Into the merits of this question, so propounded for the first time, the Lord Chancellor scarcely entered at all, but contented himself with stating that Lord Mansfield had asserted, *obiter*, the sufficiency of such a judgment; that the judges who occupied the Bench at the time did not "then and there" express any dissent from the dictum of Lord Mansfield, and ought to be, therefore, considered as assenting to its correctness; and, finally, that the Bench and Bar had, from the time of Lord Mansfield, been in the habit of considering that such a judgment was good. With regard to the first and third of these assertions, we shall presently adduce the conclusive refutation which they have received in the masterly judgment of Lord Denman. In the meanwhile we shall ourselves take the liberty of saying, in reference to the second, that if it were to be taken as a general rule that every judge must be looked upon as assenting to every proposition which is delivered upon the Bench unless he actually and expressly dissent from it, the inevitable consequence would be the continual occurrence of judicial discussions upon collateral issues. There scarcely occurs a single

"*where NO PUNISHMENT is lawful.* The judgment is not severable, and if partially wrong must, for that reason, be wholly reversed, on the very same unquestionable principle which must be applied to civil cases. The sentence in the one and the damages in the other stand on the same footing, the moment it is clear that the judgment is general and proceeds upon all the counts."—*Lord Denman's Judgment*, p. 43.

day in which some one judge does not make assertions from which some other judge is believed to dissent, although he expresses no opinion upon the occasion. In the very last judgment which was delivered by the Court of Queen's Bench, on the day before yesterday (March 1st), Mr. Justice Pattison, referring to a case in 1 Bar. & Ald., observed, that an observation made by Lord Ellenborough in the case was not in accordance with law: but, upon referring to the case, it appears that neither of the other judges, Bayley, Abbott, or Holroyd, expressed any dissent from this incorrect observation of Lord Ellenborough. That they considered it to be incorrect may be inferred with sufficient propriety from the circumstances of the case, and is rendered still more probable from the fact that one of them, Lord Tenterden, when the observation in question was afterwards brought under his notice, in the case of *Richards v. Richards**, appears to intimate an opinion that the observation of Lord Ellenborough was not correct.

With regard to the origin of the "impression," to which we have so often alluded, the following statement is made by Lord Denman: —

" My Lords, this whole doctrine has arisen upon
 " a single remark of Lord Mansfield, twice repeated.
 " It was made on occasions where it was *perfectly*
 " *immaterial to know what his Lordship might think*
 " *about criminal law*, and where it is clear that his

* 2 Bar. & Ald. 447.

“ Lordship *unnecessarily went out of his way to*
 “ *heighten a grievance* which he thought he found in
 “ the practice in civil actions as contrasted with that
 “ in criminal proceedings. He says, ‘ In cases of
 “ ‘ civil actions, where there is one good count and
 “ ‘ one bad, and the verdict is general, and for da-
 “ ‘ mages, in that case the court above will be bound
 “ ‘ to set aside that verdict, because the damages
 “ ‘ proceed upon all the counts, and you cannot tell
 “ ‘ how much may have been given for the bad
 “ ‘ count, and how much may have been given for
 “ ‘ the good count;’ and this undoubtedly is both
 “ true and, in the supposed circumstances, inevit-
 “ able. But I most deeply regret that it did not
 “ occur to Lord Mansfield that, presiding at Nisi
 “ Prius, he had a plain remedy for that evil in his
 “ own hands, because he had nothing to do but to
 “ tell the jury to assess the damages separately
 “ upon the several counts, and then the damages
 “ would have stood for what they were worth—well
 “ awarded upon those counts which were good, and
 “ liable to be set aside upon those counts which
 “ were bad. *Why upon that occasion that noble and*
 “ *learned Judge should have thought it necessary to*
 “ *say one word respecting the rule in criminal cases,*
 “ *I am quite at a loss to conceive.*”

With regard to this dictum of Lord Mansfield,
 Mr. Justice Williams observed*, “ that it was
 “ entitled to some weight — not so much for

* Opinion of the Judges, p. 20.

“expressing the *opinion* of Lord Mansfield as vouching what *had been done* — *held* to be sufficient.”* This method of putting the case evidently and correctly suggests that Lord Mansfield’s dictum is to be altogether estimated by a reference to the authorities upon which it was supposed to be founded. Now these authorities, upon being examined with even ordinary care, will be found not to *afford any warrant whatever* for the consequence which Lord Mansfield is *supposed* to have deduced from them, and which, if he did not deduce from them, he deduced from nothing at all. The following are the terms in which the two cases in question have been reviewed by Lord Denman † :—

“The first case quoted was the *Queen v. Rhodes*, which occurred in the time of Lord Chief Justice Holt, and is reported in 2d Lord Raymond’s Reports. That was an indictment for subornation of perjury. There were several assignments of perjury. The defendant was convicted of the offence. ‘But then,’ said the counsel for the defendant, ‘some of those assignments of perjury are bad, and therefore the judgment is bad, because general.’ That was in arrest of judgment also. But I should have answered him, as I think Lord Holt did answer him upon that occasion, — for that is the meaning I ascribe to what he says, and I know it is a course which we have taken

* The italics are of Mr. Justice Williams himself.

† Judgment, edited by Mr. Leahy, p. 36.

“ very recently, — the question is a question of per-
 “ jury ; it does not signify how many assignments
 “ there are : there may be twenty which are bad, and
 “ only one which is good ; but you still convict
 “ him of subornation of perjury. It is no separate
 “ finding. It is not for ‘ his said several offences,’
 “ but for his one single offence of subornation of
 “ perjury ; and whether the overt acts are more or
 “ fewer, or only a parcel of unmeaning words have
 “ been added, is perfectly indifferent as to making it
 “ a good judgment upon the only crime charged in
 “ the indictment. I think that this is an answer
 “ which entirely explains that case, and shows it to
 “ be of no application in the present instance.

“ Then my noble and learned friend referred to the
 “ case of *The Queen v. Ingram*, which is in *Salkeld* :
 “ and what do your Lordships think that case was ?
 “ It was a charge against a man and his wife, that
 “ they were guilty of an assault. There was a motion
 “ in arrest of judgment. The objection was some-
 “ thing of a grammatical nature. In the first part
 “ of the indictment the singular number was used,
 “ *insultum fecit* (all the indictments at that time were
 “ in Latin), upon which the grammarians who de-
 “ fended the parties said, ‘ This is a bad record,
 “ ‘ because the *insultum fecit* (that is, made an
 “ ‘ assault) only applies to some one of those two,
 “ ‘ and we do not know which.’ But however bad
 “ that grammar, or however doubtful the charge, the
 “ following words were correct and perfectly clear,

“ and touched both defendants. The same count;
 “ *there being only one*, proceeded to say ‘ *vulneraverunt*
 “ ‘ *et verberaverunt.*’ A little bit of false grammar
 “ which comes in before is of no consequence at all,
 “ with reference to the punishment of those who have
 “ been convicted of the offence well and gramma-
 “ tically laid. Chief Justice Parker said, upon that
 “ occasion, ‘ If any part of the count is good the
 “ whole is good;’ and so it is: yet that case is
 “ quoted to prove a judgment good which rests on
 “ two counts, one good and one bad. *And those two*
 “ *are the only cases before the time of Lord Mans-*
 “ *field* which are now quoted as establishing his
 “ position, stated by him in a civil action, *not dis-*
 “ *tinctly upon the point in question*, but antitheti-
 “ cally, as serving to illustrate the supposed absur-
 “ dity of the rule in civil cases. I admit that cases
 “ come afterwards which require some explanation ;
 “ but the first explanation is to be found in the
 “ general language which was employed by so great
 “ an authority upon this subject, and a want of any
 “ examination into what the principle really was.”

These cases his Lordship then proceeds to ex-
 amine in the following words: —

“ My noble and learned friends have selected, of
 “ course, those authorities which they thought the
 “ strongest; and to those I shall direct my attention.
 “ The first. I think, which was mentioned was the
 “ case of *The King v. Powell*, which is reported in
 “ the second volume of *Barnewall and Adolphus*,

“ in which there was a general verdict of guilty
 “ for two offences stated in two different counts,
 “ one of them charging an assault with a particular
 “ intent, and the other a common assault. The
 “ sentence was general, and was such as only the
 “ verdict upon the first count warranted, and a
 “ writ of error was brought. Now there is one
 “ very remarkable circumstance in that case, which
 “ appears in the judgment of Mr. Justice Taunton.
 “ He says, ‘ When I look at this indictment, I do
 “ ‘ not find that it states two offences ; it does not
 “ ‘ say that he committed *another* assault, which is
 “ ‘ the usual course of doing it ; but in fact it is
 “ ‘ only another description of the same assault, and
 “ ‘ therefore there is nothing at all wrong in saying
 “ ‘ that the heavier punishment which the first
 “ ‘ count enabled the Court to award is properly
 “ ‘ assigned.’ But the only objection taken there
 “ was simply this, that the words ‘ misdemeanour
 “ ‘ and offence ’ applied to one of the counts alone :
 “ the Court held that it applied to both ; that
 “ ‘ misdemeanour ’ ought not to be confined to the
 “ offence described in one count, but is *nomen col-*
 “ *lectivum*, including the offence, with its aggra-
 “ vations, as stated in the first count, as well as
 “ the mere assault, as stated in the second. That
 “ is the decision which the Court came to upon
 “ that occasion : and to apply that here, as laying
 “ down the principle that we must secure the right
 “ of the prosecutor to convict generally, and have

“ a general sentence passed, unquestionably in error, though it should turn out afterwards that there was some bad count in the indictment, stating a different misdemeanour, is what I cannot at all understand.”

Mr. Justice Pattison had observed * of this case (*The King v. Powell*), that “ it was the *nearest case* to the present ;” and after having examined it at some length, he concludes by saying that it “ is *no direct authority* to show *that the doctrine*” [contended for on the part of Mr. O’Connell] “ *was not right* ;” — that is to say, that the *very best of the authorities* adduced upon the part of the *prosecution* did not show that the judgment of the Irish Court of Queen’s Bench *was correct*. The learned Judge goes on, however, to say, that the case in question, taken along with other authorities, went to “ show, at all events, what had been the *received* opinion upon the subject.” But if it showed this it only showed upon one side what was not at all denied upon the other. Upon this point the following observation of Lord Cottenham is immediately applicable and extremely important:—“ The case in question,” says his Lordship †, “ proves only what the learned Judges have informed us, that such an impression has existed generally in the profession—a circumstance which certainly ought not in general to be disregarded. When, however, it is found that such

* Opinions of the Judges, p. 15.

† Judgment of Lord Cottenham, p. 5.

“an impression *could not have arisen from DECISIONS,*
 “for there are *none, or from PRACTICE,* for upon
 “these particular points *none* seems to have existed;
 “but that the origin of the impression can be safely
 “referred to a species of proceeding” [motions in
 arrest of judgment], “*at first sight similar* to the
 “case under consideration” [namely, that of a writ
 of error], “*but found, upon examination, to be TO-*
 “TALLY DISTINCT *from it,* I cannot think that any
 “weight ought to be given to such an impression.”

After having so examined the case of *The King v. Powell*, Lord Denman proceeds to make the following observations upon other authorities of a date posterior to the dictum of Lord Mansfield:—

“Then, my Lords, we come to the case of
 “*The King v. Hill*, which is in 1st Russell and
 “Ryan, and which in my opinion *has really no*
 “*application whatever to this subject.* The party
 “was there found guilty of an offence at the
 “assizes, the same offence being stated in six or
 “seven different counts. The question was, whether
 “*all* those counts were not bad; and Mr. Justice
 “Chambré, the learned judge who tried the cause,
 “had the prisoner convicted, and passed a sentence
 “upon all the counts which a conviction upon
 “any one of the counts would have warranted:
 “but he said, ‘I will reserve this point for you.’
 “That was a matter of arrangement between the
 “counsel and the judge at the trial. What was
 “the arrangement? Why, that if *all* the counts

“ were *bad* the prisoner should be pardoned ; but if
 “ *any one* count was *good* the prisoner was to un-
 “ dergo his sentence. From that it is inferred that
 “ had a writ of error been brought upon a judg-
 “ ment upon all those counts the judgment would
 “ have stood, notwithstanding five or six were bad.
 “ I do not know how the judgment was entered ;
 “ but I know the reservation was, ‘ He is convicted,
 “ ‘ upon condition that I find *one* good count. On
 “ ‘ condition that all the counts are not bad, the con-
 “ ‘ viction stands, and there is an end of it.’ I have
 “ no reason to doubt that the judgment was pro-
 “ perly entered. I am quite sure, if I had tried
 “ the case it would have been so, because it is my
 “ constant practice, and I believe that of several
 “ other judges, to take care, that, with their know-
 “ ledge, no judgment shall ever be entered for the
 “ Crown upon a bad count.

“ In *The King v. Mason* the judgment was arrested
 “ because *all the counts were bad*. That case requires
 “ no other comment. In *The King v. Young*, how-
 “ ever, a difficulty, I admit, arises, because there
 “ the punishment was discretionary. The Court
 “ might either have pilloried, or imprisoned, or
 “ transported. They thought proper to transport ;
 “ and I agree with the observation which has just
 “ been made, that though, if they were to transport,
 “ it could only be for the term of seven years, they
 “ must have exercised a discretion in electing that
 “ mode of punishment, and that therefore they did

“ pass sentence upon an indictment which appears
 “ to have been wrong as respects two of the counts —
 “ a sentence which was affirmed on a writ of error.
 “ According to my argument I agree that that
 “ judgment was wrong. I agree, also, that to the
 “ answer, ‘ the objection was not taken,’ it is a
 “ strong reply, that that learned Court and the
 “ eminent counsel employed would have been very
 “ likely to take it if well founded. But I must
 “ apply my brother Parke’s observation, that it is
 “ *perfectly clear* that upon *that indictment* (as in
 “ *R. v. Powell*) *the several counts were only several*
 “ *descriptions of one set of facts*; and though that
 “ may not be properly discoverable from the record,
 “ still, in point of substance and effect, *proof of*
 “ *those facts warranted the sentence.*

“ So where a felony was established requiring
 “ capital punishment or transportation for life, the
 “ number of counts could make no difference, be-
 “ cause the punishment pronounced upon any one
 “ of them exhausted the whole materials of punish-
 “ ment, and admitted of no addition. The effect is
 “ a judgment for one felony stated in various forms,
 “ not for a variety of misdemeanors described as
 “ ‘ his said offences.’

“ The case of *Rex v. Young*, or rather *the course*
 “ *which was NOT resorted to in the case of Rex v.*
 “ *Young*, is really the whole strength of authority
 “ relied on by the Crown in this argument. It is
 “ said, ‘ This point, if available, should have been

“ ‘ taken, but was not taken.’ I can only explain it
 “ by the current notion that one count alone would
 “ support any sentence applicable to the offences
 “ stated in the whole indictment, and can only
 “ account for that notion by Lord Mansfield’s gene-
 “ ral words, *needlessly and inconsiderately uttered,*
 “ *hastily adopted, and applied to a stage of the pro-*
 “ *ceedings in which they are not correct in point of*
 “ *law.*

“ My noble and learned friend on the woolsack
 “ denied all distinction between the proceeding by
 “ arrest of judgment and that by writ of error, for
 “ the purpose of the present debate. And it is
 “ curious that the learned reporter, in his marginal
 “ note to this case of *Rex v. Young*, says that the
 “ Court refused to *arrest the judgment*, though in fact
 “ they refused to *reverse it on writ of error*. The
 “ identity of the two proceedings is assumed — *an*
 “ *assumption which shows the hasty manner in which*
 “ *opinions are occasionally taken up. The difference*
 “ *is, however, palpable. In the former case the Court*
 “ *abstains from pronouncing judgment upon any*
 “ *count that may be deemed erroneous ; the judgment*
 “ *may, however, be properly entered up on such counts*
 “ *as are good: in the latter the judgment, having*
 “ *already been finally entered up, cannot stand if it*
 “ *rest on any materials which are vicious in point of*
 “ *law.* ‘ But what absurdity,’ says my noble and
 “ learned friend near me (Lord Brougham), ‘ to
 “ ‘ suppose that a court should refuse to arrest the
 “ ‘ judgment on a bad count, and yet leave the bad

“ ‘ count on the record, so that, when judgment
 “ ‘ was entered up on that record, the vice of that
 “ ‘ one count should be left to subvert it altogethe-
 “ ‘ ther!’ I should rather suppose that *care would*
 “ *be taken to forbear from entering up judgment on*
 “ *the bad portion of the indictment; and if the pro-*
 “ *secutor should perversely so enter it up, I cannot*
 “ *doubt that the same reasoning, which has convinced*
 “ *myself, and others of more authority, would have*
 “ *induced the Court to decide against it, if the objec-*
 “ *tion had been pointedly propounded.*”

It is agreed upon all hands that the opinion, though “received,” was never examined; and that its “reception” was the consequence of “receiving” another opinion, namely, that the judges of the court below always examine the indictment before they pronounce the judgment, and never inflict any punishment in reference to any counts, either badly framed or badly found, which that instrument may contain. As far as this “received opinion” is applicable to the present case, the question is stated by Lord Cottenham* in the following words:—“If we read this record *as we should any other document, and give to* “the words which we find there the construction *which they would receive if read in any other instrument, we find it distinctly stated by the* “record that the defendants were charged in the “indictment with the several offences specified in “the several counts, and that the jury found ver-

* Lord Cottenham's Judgment, p. 2.

“dicts of guilty upon all and each of them,”* [repeating in so many words all the distinct and several charges in them all; after which the record proceeds in these words: “whereupon *all* “*and SINGULAR the premises having been seen and* “*FULLY understood by the Court of our Lady the* “*Queen,*” †] “the Court sentences each defendant to a certain punishment ‘for his offences “‘aforesaid.’” Lord Cottenham, upon this condition of the statement upon the record, proceeds in the following words: — “Did not the court below “then pass sentence upon the present defendants “for the offences charged in the first, second, third, “fourth, sixth, and seventh counts, as well as upon “the offences charged in the others. *The record* “*of that court tells us that it did;* and if our duty “be to see whether there has been any error upon “that record, and if we adopt the unanimous opinion of all the judges,” [in England] “that those “counts (the first, second, third, fourth, sixth, and “seventh), or the findings upon them, *are so bad* “*that no judgment upon them could be good,* how “are we to give judgment for the Crown, and say “thereby that there is no error upon the record?”

* In reference to this matter, Chief Justice Pennefeather, in refusing the motion in arrest of judgment, observed, “Take “any one count of the remaining set” [after the 5th] “in “these counts” [the 6th and 7th, &c.], “those dangerous “offences are set out in a way which, in my opinion, *requires* “*no further certainty. The jury have awarded upon each of* “*them,* and I see not why the judgment should be arrested.”

† Lord Campbell’s Judgment, p. 5.

This observation, equally plain and powerful, does, in our humble opinion, effectually dispose of this part of the case. The professional reader will, moreover, have observed that Lord Cottenham, in the passage which we have given above, rather *understates* the principles upon which a record is to be read. It is an ancient and absolute *axiom* of the common law, that a record is of so high a nature that no averment can be taken against it*, even though the matter be *only* SUPPOSED† *by the record*; and Lord Ellenborough C. J.‡ declared that “the judgment roll imports *incontrovertible* “*verity as to all the PROCEEDINGS which it sets forth*; “*and so much so, that a party cannot be admitted to plead that the things which it professes to state are not true,*” whether they are true or not. According, however, to the principle of Lord Lyndhurst, the record in the case of *The Queen v. O’Connell* is either false or insensible in its actual form; and before it can possess either uncontrollable verity, or even intelligible meaning, we must read it as if it contained some twenty or thirty words which are not there at all.

According to Lord Lyndhurst the record must be read as if it contained, upon the face of it, an allegation that before delivering the sentence upon the defendant the Court had carefully considered whether there were any bad counts, or bad findings, or bad entries, and that, in awarding a certain

* Co. Lit. 260 a., 167 b. 168 a.

† 1 Leon, 82.

‡ *Ramsbotham v. Buckhurst*.

quantity of punishment, they took into their consideration any such defects as may exist under either of these three different heads. But the argument of Lord Lyndhurst himself proves that *if* the record *actually contained* such an averment the record would be so far from "importing uncontrollable verity" that it would exhibit unquestionable falsehood. The very first foundation which Lord Lyndhurst himself lays at the bottom of his whole argument * is, that no such examination ever takes place, as it is considered to be unnecessary and useless. Let us, however, suppose that the Court makes allowance for any bad *counts* that may exist in the indictment. Such a supposition has been proved by Lord Lyndhurst's argument to be untrue in presumption: it is notoriously untrue in general as a matter of practice and of fact: all the world knows that it is most extravagantly untrue in the present case. Let us, however, waive all these objections, and suppose it to be true. How can we possibly admit the other presumption, that in pronouncing judgment upon a defendant every court must be presumed to have taken into its consideration any defects which may exist upon the findings when it is notorious to all mankind that in ninety-nine cases out of a hundred there never are any formal findings at all. Everybody knows that almost universally the jury content themselves upon such occasions with pronouncing through their foreman

* Page 2.

the single word guilty, intimating thereby the conclusion which they have drawn as a matter of fact from the circumstances of the case, and that the Court immediately afterwards proceeds to sentence the defendant to what it considers to be an adequate punishment for the offence or offences of which the party has been convicted. The registrar of the Court in the mean time inscribes the word guilty upon the indictment, which inscription concludes all the clerical manipulation that is ever performed with reference to this point, except in perhaps one case out of five hundred.

But the presumption which is so obviously unfounded in general is most curiously and extravagantly untrue in the present instance. How can it be for a moment imagined that the Court of Queen's Bench in Dublin took into consideration the badness of the *findings* upon the first four counts of the indictment, when, as we have already stated *, the issue-paper upon which those findings were entered was *actually composed by the whole Court itself, and when after such composition the contents and form of the issue-paper were the subject of open public discussion between the judges and the counsel, and when the paper was not handed to the jury until it had received the express approbation of the judges, and of the counsel for the Crown, and, as was alleged, even of the counsel for the defence.* After all this preparation "Mr. Justice Crampton† in-

* Suprà, p. 208. & 212.

† Report of Messrs. Armstrong and Trevor, p. 888.

“ formed the jury that he *was directed by the Court* “ to read the different FINDINGS, in order to guide the “ jury as to the mode in which they should sign the “ *issue-paper* to be sent up to them.” He accordingly read the document which he then handed to the foreman, by whom it was, after a very short interval, handed back to the Court, with the different findings, which the jury had “ signed,” in “ the mode ” as to which they were “ guided ” by the Judges and the counsel for the Crown.

The findings having been in this manner drawn up, signed, and returned, the issue-paper was again read over, with the findings annexed ; after which the Chief Justice, addressing the counsel on both sides, observed that he supposed there was nothing more to be done. The Attorney General answered that there was not. The Chief Justice complimented the jury upon their conduct. One of the counsel for the defence then asked for a copy of the issue-paper, which was promised, after which the court adjourned. We have already stated* that the jury had, before the occasion which we have just now been describing, returned a verdict upon another issue-paper, which had previously been handed up to the jury by the Court, and that such verdict was rejected for the supposed irregularity incompleteness, inadequacy, and illegality of the findings. It was to exclude the possibility of any such objection being adducible against the

* Suprà, p. 207.

ultimate verdict that the findings in the second paper were *actually, openly, deliberately, and expressly composed in the manner which we have just mentioned*: it may therefore with perfect propriety be asserted, that the *findings* in the form in which they were finally signed by the jury, were *the act of the Judges themselves*, and that those learned persons *considered the findings* in that form to be absolutely *immaculate*.

We ask then, in such a state of affairs, after all the care which the Court exerted in this manner for the purpose of making those findings unexceptionable — after sending them to the jury as such — after having received them without the intimation of an objection, or even of a doubt, from any quarter whatever, can anything in the whole world of art or nature be more extravagant than to presume that this very Court was all this time under the impression that the findings were defective, *which findings they publicly approved, and even publicly composed?* And this most extravagant of all imaginable presumptions Lord Lyndhurst calls upon us to make, although the very ground of the Irish Attorney General's complaint upon this subject at the Bar of the House of Lords was, that the attention of the Irish Judges had never been at all directed to the badness of the findings.* We do not precisely know whether this statement of the Attorney General be correct or not; but whether it be or not is not an affair of

* Vide *infra*, p. 346.

the slightest possible importance. Let us suppose that, according to the statement of the Attorney-General, the Court did not, either of its own motion, or in consequence of any extrinsical suggestion, take the findings into consideration. What, in such a case, became of the presumption that they *must have considered* and allowed for the badness of the findings. If, on the other hand, the court below considered the findings before they pronounced the judgment, they thought the findings to be good, or they thought them to be bad. If they ultimately decided that the findings which were composed by themselves were illegal, and insufficient to support the judgment, what becomes of the infallibility, which is the foundation of the whole argument upon the part of the Crown? If on the other hand they decided, upon consideration, that the findings were good, how is it possible to conceive that they must have taken the *badness* of those findings into their consideration, and awarded no punishment in reference to the counts which were found so illegally.

But let us, notwithstanding the essential absurdity and practical untruth of such a supposition—let us imagine that the judges had taken into account the badness of the two counts which they declared to be unexceptionable, *and* still more that they were absolutely aware of the badness of the findings which had been anxiously composed by themselves, and which they considered to be imma-

culate, it is necessary for the conclusion of the Lord Chancellor to go still further, and presume, as the Lord Chancellor contends that he is justified in doing*, that every Court, in passing sentence upon a defendant, examines the entries upon record with regard to those findings, which are entered in such a manner as to render the count upon which they are so made altogether incapable of supporting a judgment. With regard to the entries of the findings upon record, it may be asserted with safety that throughout the whole administration of criminal justice there scarcely, as we suppose, can be as much as *one* record — one judgment roll with formal entries — for every five hundred actual convictions; whilst it may be truly asserted that in the great majority of cases in which records are drawn up such operation does not take place until after the sentence has been pronounced. To presume, therefore, that in every case where a court pronounces judgment upon a defendant it takes into consideration the findings upon the record, is really to presume that the Court examines a very large number of records which do not, and never will exist, and another smaller number, which does not come into existence until after the period of the supposed examination. The court which can act in this manner must be guided not by the “spirit of judgment,” but by “the spirit of prophecy,” and not merely by that intelligible

* Judgment, p. 1.

general prophetic power which anticipates events that are thereafter to happen, but by that Hibernian species of the gift which can foresee that which will never happen at all. In the present instance, the form in which the entries were to be made would in such a case require a good deal of consideration, as is evident not only upon the case itself, but from the fact that all the consideration which has been given to that point has not been sufficient to ensure the correctness of the entries. It is true that the entries as they appear upon the record are dated of a date anterior to the judgment. Such, however, would be the case, wherever they may happen to have been entered in fact. Upon this very part of the record appears the entry of the *nolle prosequi* in respect to Mr. Tierney, which entry is dated on the 22d of May. But this entry *must* have been made in consequence of what occurred upon the delivery of the judgment of the Court of Queen's Bench upon the motion for a new trial upon the 25th of May. Upon that occasion Mr. Justice Crampton declared that he would consent to the motion unless the Attorney-General should agree to enter a *nolle prosequi* as regarded Mr. Tierney. This entry was afterward made, at what precise period afterwards we do not exactly know; upon the record, however, it is dated retrospectively as of the 22d of May, *i. e.* three days before the suggestion of making the entry was thrown out by Mr. Justice

Crampton. Upon the same day an application was made upon the part of the DEFENDANTS to amend the entries upon the *postea*. The motion was opposed by the Attorney-General, who read the entries, most probably from a copy on paper, and contended that they were perfectly correct. From the account of the discussions which appeared in the newspapers it seems difficult to decide whether the entries were then *upon the parchment* or not; but in either condition of the fact the consequence as to the consideration in question will be exactly the same. If the entries were then upon the parchment record in the form in which they afterwards came before the House of Lords, it is impossible that the court below could in giving judgment have made allowance for any supposed badness in the entries, as the Court *unanimously refused the motion for their amendment*, and must have therefore considered that they did not require any amendment at all. If, on the other hand, the entries as they ultimately appeared were not then upon the record, then any supposed allowance for their badness must be a *physical* impossibility, as the Court could not of course, by any possibility, know the form of an entry which did not exist at all as a matter of fact. The subsequent motion in arrest of judgment was exclusively founded upon considerations connected with the essential deficiencies of the Courts themselves, and nothing further was said about the findings, or

the entries, until the case came to be argued in the House of Lords.*

Lord Lyndhurst says, that we cannot go out of the record for the purpose of calling in aid any fact which does not appear upon the record itself. This was all said, of course, in order to prevent the annihilating effect which must be produced upon the argument of the noble and learned Lord by the fact — notorious at New York and Alexandria — that the Court of Queen's Bench in Dublin expressed a most decided and most deliberate opinion, after hearing a long argument upon the subject, that the counts which all the law lords and judges in England declared to contain no charge of any offence at all were not only unanimously considered by the Court "on the other side" of the water to be the most unexceptionable in the indictment, but that the said Court had expressly, and most warmly and frequently, declared that it was for the [so called] offence alleged in those counts, of showing that large numbers of persons were favourable to a change in the law, that the greatest part of the punishment was inflicted. One would think that, instead of shutting out this unquestionable and all-important fact by the screen of a conjectural and hypocryphal presumption to the contrary, a person in the place of the Lord Chancellor — who himself knew the fact as well as he knew that he was the Lord Chancellor of England — would consider the probable existence of such a fact in general, and

* Vide *infra*, p. 346.

the undoubted existence of it in the particular case, as an irresistible reason for looking with suspicion, at least, upon a presumption which, according to the very argument of the Lord Chancellor himself, was so very likely to be generally untrue.

Waiving, however, this consideration, let us adopt the principle of Lord Lyndhurst, as laid down by himself, that in construing a record you cannot call in aid any fact which does not appear upon the record itself. How, then, can you justify the actual introduction into and upon the record of a statement which of necessity involves, not one fact, but several — a statement which is not only very complex in its nature, but which is most undoubtedly in direct, as well as in evident opposition to that which the record itself professes to declare — a statement that the court below, before proceeding to award any punishment against the defendant for “his offences aforesaid,” very sedulously applied itself to the consideration of the record; that, upon such consideration, they found that the sixth count was bad, and the seventh count no better; that the first, second, third, and fourth counts had been ill-found, and were totally incapable of supporting a judgment; that the bad findings upon the first three of those counts had not been at all mended by any subsequent occurrence, but that the bad finding upon the fourth count had been cured by the *nolle prosequi* of Mr. Tierney, according to the then future opinions of some of the English judges, but had not been so cured

according to the opinions of some other of the English judges; that the fourth count was therefore, at one and the same time, capable and incapable of supporting a judgment, and that the Irish Court of Queen's Bench therefore, according to the "legal construction of the record," must be taken at one and the same time to have awarded the punishment in respect to that count, and not to have awarded the punishment in respect of that count: and all this must be supposed to have been done in consequence of then future opinions which had never been delivered, and a then future occurrence which had never occurred.

Such is the goodly exhibition of consequentiality and common sense which results from what the Lord Chancellor calls * "construing the record "according to its legal effect." Such is the congeries of contradictory and impossible facts which we are called upon to introduce into the record, in order to support the principle that no fact is to be introduced into the record which does not appear upon the face of the record itself.

But let us concede to the Lord Chancellor the principal assumption which he claims, and suppose that the judgment was not given upon the counts that were either ill-framed or ill-found. It is unquestionably certain that if the judgment were entered in that general form upon the record it would be incurably vicious, according to the uni-

* Judgment, p. 3.

versal consent of all judicial and forensic mankind, upon the mere ground of uncertainty alone. Let us therefore carry the concession further, and suppose that the court below actually specified upon the record the counts which were in its opinion ill-found or ill-framed. If that opinion were correct, we should then have arrived at the perspicuity and precision for which we contend, and the present question could not have arisen at all. But in such a case, if the opinion of the court below was incorrect as to the goodness of the counts, the judgment would be set aside upon a writ of error as a matter of course. Let us now suppose that the court below gives judgment of conviction upon two indictments, that in each case it examines the record, and in each awards the punishment only in reference to the counts which it believes to be good; let us suppose that it is in both cases mistaken, but that in one record it specifies the counts upon which the judgment was given, and that in the other it does not. In the first of these cases the judgment would of course be reversed, and the defendant discharged; in the second case the judgment would be affirmed, not because the defendant had committed any offence against the law, which, according to the supposition, he had not committed, but because upon an indictment containing several charges, and upon which the defendant had been generally found guilty, the Court had not condescended to inform him of the particular charge

in reference to which the punishment was awarded ; and in that case the Court, both above and below, would punish the defendant, not for the delinquency of the defendant, but for that of the Court itself. The court below would punish him for its own neglect or indifference, and the court above would continue and confirm the punishment upon the presumption of the industry and intelligence of the court below.

The judgment of Lord Brougham does not require any lengthened examination. He took a vast quantity of trouble, as the Lord Chancellor had previously done, to prove what nobody had ever thought of denying, namely, the existence in the legal profession of that general " opinion," " assumption," " impression," or whatever it is to be called, to which we have already so frequently alluded ; and he contended, as Lord Lyndhurst had done, that the information communicated by the judges, in reference to the existing cases upon the subject, as well as an examination of those cases themselves, proved that such impression had been acted upon for a considerable time. But neither of those noble and learned lords uttered a word about *what was really the subject for the decision of the House of Lords*, namely, whether the " impression " had not been received upon slight grounds, or no grounds at all ; whether it had not been rashly and inconsiderately taken for granted, under a mistake of the meaning of an *obiter dictum*,

or without ascertaining precisely what was its particular meaning, if it was to be considered as having any specific meaning at all; and, finally, whether this "impression," so negatively *tolerated* without *adjudication* or *even examination*, was not *so obviously and considerably in opposition to the plainest principles of justice, of reason, and of law, that it ought to be immediately abandoned*, unless it had received that long, deliberate, and unbroken sanction, under the shelter of which so many abuses and absurdities have been able to establish and maintain themselves within the ancient pale of the English common law. Instead of arguing upon the merits of this question, which was really the only one in controversy, the Lord Chancellor and Lord Brougham substantially abdicated their offices and abandoned their duties as members of a court of appeal, and recommended the other lords present to decide in conformity to the information given by the majority of the judges; Lord Lyndhurst declaring that the opinions of the judges ought to be followed, unless the House should be satisfied that they were founded in *palpable error**, and Lord Brougham expressly stating that he "*had NO RIGHT to set up his judgment and opinion against the judgment and opinion of such men*, formed upon such materials, and strengthened by such talents and learning, and above all, fortified by such large and long-con-

* Page 8.

“tinued experience as they possessed.” What particular amount of propriety or consistency there was in either of the two noble and learned lords placing themselves, or the House, or the learned judges in *such* relative positions amongst themselves, will appear from a perusal of the following passage from the judgment of Lord Denman*: —

“My Lords, I quite agree with my right honourable and learned friend Mr. Baron Parke, as to the *general opinion which has prevailed in the profession upon this point*. He and Mr. Justice Coltman have both stated the *existence* of that opinion as a *fact* upon which no doubt can be entertained. I felt, as my learned brothers did, great surprise when I heard that most able and ingenious argument which was addressed to the House, and I confess that I had never felt a doubt upon the subject until that argument was submitted to my mind. But I must add that *I never had occasion to give a judicial or a professional consideration to the matter*. And I must ask, when such an argument is raised, *what is the duty of a Court of Error?* To consider whether the doubt is well founded or not. *Not to be run away with by mere authority*, unless indeed it is so decisive as to get rid of the doubt, but *to see whether in point of law there is legal ground for the doubt which is entertained*. My Lords, this is no unusual practice. This is not

* Page 22. of Mr. Leahy's edition.

“ the first time that a Court of Error has taken that
 “ view. I perfectly well remember, not indeed in
 “ a Court of Error, but at the time when my noble
 “ and learned friend on the woolsack was presiding
 “ with so much dignity, and so beneficially to the
 “ public, in the Court of Exchequer, a case was
 “ brought before that Court, upon which it was
 “ proposed to overrule, *not the dicta, the impres-*
 “ *sions, the fancies of the learned frequenters of*
 “ *Westminster Hall, but* DECIDED CASES, RUNNING
 “ *through a period of near FIFTY YEARS, appearing in*
 “ NUMEROUS REPORTS, *and laid down by ALL THE*
 “ TEXT WRITERS. Mr. Justice Bayley, on a par-
 “ ticular examination of those cases, *thought them*
 “ *clearly founded in error*; they were traced to a
 “ *dictum of Lord Mansfield* during his first judicial
 “ year, which was held by Mr. Justice Bayley to be
 “ *untenable*, and my noble and learned friend, Lord
 “ Lyndhurst, pronounced the *unanimous judgment*
 “ *of his Court, denying their authority, AND OVER-*
 “ RULING THEM ALL. *

“ I heard my noble and learned friend with the
 “ admiration I always do, when he laid down the
 “ rule on this subject. He reminded your Lord-
 “ ships that you are not bound to do more than re-
 “ spect in the highest degree, and consider with the
 “ utmost care, the opinions which may be given to

* The case to which Lord Denman refers in this place is
 that of *Hutton v. Balme*, 2 Y. & J. 101; 2 Cr. & J. 19; 2 Tyr.
 17.

“ you by the Judges. But you have *a duty of your own to perform. Your consciences* are to be satisfied ; *your minds* are to be made up ; *your privilege* affords you the assistance of the most learned men living ; but *your duty* forbids you to *delegate your office* to them.

“ And, my Lords, what happened in *this very House* not twelve months ago ? *There was an UNIVERSAL OPINION at the English bar*, founded upon the dicta of Judges *as illustrious as any who have ever filled the seats of justice in any country*, upon a question of no less importance than *the Nature of Marriage* ; Lord Mansfield, Lord Ellenborough, Lord Kenyon, Lord Tenterden, Lord Chief Justice Gibbs, and many others, *all clearly taking the same view of the subject* in dicta which perhaps did not in any one of them go precisely to the extent of a decision upon the subject, but which showed their opinion upon the nature of the contract, and that *those enlightened minds had come upon general principles to a certain conclusion*. Nay more, Lord Stowell, *half a century of whose invaluable life had been devoted almost exclusively to the consideration of this subject*, had pronounced a decision conformable to that opinion. Your Lordships had the case before you. *The Judges of the present day were consulted*, and formed an opinion directly contrary to that of *their predecessors in former times* ; *THEY did not feel themselves deterred by this great concurrence*

“ *of authorities* from asserting their opinion as to
 “ the law.

“ But did my noble and learned friend (*Lord Brougham*) feel himself *fettered* by this *unanimous opinion* of the *present luminaries* of *Westminster Hall*? By a most powerful argument *he sought to overthrow their conclusion*, and strenuously exhorted your Lordships to *dissent from it*. Nor did he stand alone: others among us concurred with him in holding the former principles to be just, and the reasoning of all my learned brethren to be insufficient to confute them.

“ Your Lordships have not forgotten the termination of that case. Those of your Lordships who took a part in the discussion were equally divided; the consequence of which was, that the judgment of the Court below stood affirmed, *deciding against the dicta of those most venerable and distinguished individuals*.

“ Now, my Lords, after that proceeding, which *indeed followed many precedents*, are we not bound to make a full examination of the GROUNDS AND REASONS upon which the Judges may found the opinion which we asked at their hands? Having done so in this case, I must venture to say that *my surprise has changed its object*. I no longer wonder that the objection should have been taken to the SUPPOSED law, but that such should have been SUPPOSED to be the law. I am convinced that it *never has been the law*; and I think a slight atten-

“tion to the cases will show that *that* is the true
“conclusion at which to arrive.”*

But after all, *do* the opinions of the seven English Judges, as actually delivered, demonstrate even the decided *existence* of the “impression” in the form which has been assumed. We venture to assert that they do not, and that a very slight reference to them will be sufficient to prove our assertion. Let us take the opinions in the order in which they were delivered in the House. Lord Chief Justice Tindal sums up the whole value of his own opinion upon the point in the following words†:—“I *con-*
“*ceive* the law to be, that the judgment in the
“case proceeds upon the good counts only; there
“is certainly no authority against this position.
“The *inference* to be drawn from the case of Young
“*v. The King* is strong in support of the doctrine;
“[that upon an indictment containing good counts

* Sir William Blackstone, after having stated that it was an established rule “to abide by former precedents,” goes on to observe, “yet this rule admits of exception, where the former determination is evidently contrary to reason. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd and unjust, it is declared, not that such a decision was *bad* law, but that it was *not* law; that is, that it was not the established custom of the realm, as had been erroneously determined.” — *Comment.* book i. pp. 69, 70.

† Opinions of the Judges, as printed by order of the House of Lords, p. 6.

“ and bad, a general judgment is to be presumed to
 “ be given upon the good counts ;] *and IF the judg-*
 “ *ment proceeds upon the good counts only, the whole*
 “ *difficulty is at an end.*” But IF NOT, AS IN THE
 CASE IN QUESTION *it* MOST INDISPUTABLY *did* NOT, THE
 WHOLE DIFFICULTY IS EQUALLY AT AN END, *but in a*
very different manner ; for then, that is to say, in
 the actual and unquestionable condition of the facts
 of the present case, the judgment of the Court of
 Queen’s Bench was a nullity.

Mr. Justice Patteson delivered his opinion in the
 next place. We have already* cited the statement
 of the learned judge, that the very strongest au-
 thority to which a reference had been made for the
 purpose of proving the existence of the “impression,”
 was not quite sufficient to prove it. Upon that
 point it is unnecessary, therefore, to say any more at
 present. Another part of the learned judge’s opinion
 requires a more particular notice. The learned
 judge observes†, “ If there be any question in a
 “ Court of Error as to the sufficiency of any
 “ count, surely that Court is *bound to suppose* that
 “ *the court below* NOT *having given* a separate judg-
 “ *ment upon each count* HAS *given* its judgment
 “ *in respect of each count.*” The learned judge
 assigns no reason why the Court of Appeal should
 make this very extraordinary supposition. But
 some reason, and some very strong one too, would

* Suprà, p. 265.

† Opinions of the Judges, p. 14.

seem to be necessary to support a doctrine which calls upon the court above to *suppose* TO BE *true* that which the party calling upon the court so to suppose, expressly *declares* NOT to be *true*.

“The court below *not* having given a separate “judgment in respect of each count,”—to call upon the court above to suppose that the court below “*has* given a separate judgment in respect of each “count,” is simply to call upon the court above to suppose not only what is untrue, but what is absolutely declared to be untrue by the very party who calls upon the court above to suppose it to be true.

But waiving the irreconcilable contradiction between the two parts of the theory, let us consider the principal part of the supposition itself. Mr. Justice Patteson declares that the House of Lords is bound to suppose that the court below has given its judgment, and passed the whole of its sentence in respect of each count, good and bad, and that in such case the judgment will be supported by the good counts, although there may be others which are bad. If the court below in such a case *knew* that some counts were bad, can it be imagined that they deliberately and intentionally passed the whole judgment, and awarded the whole punishment in respect to each of the bad counts as well as to each of the good—being at the time aware that the bad counts *were* bad? But if on the other hand the court below, at the moment of

awarding the punishment, *did not know* which counts *were bad*, or *whether any were such*, how is it possible to imagine that they must have awarded the punishment upon the good counts alone? and what becomes of the theory that they must have known which counts were bad, and confined their judgment altogether to such as were good?

But supposing that such a judgment had been delivered, it is evident that whenever all the counts in the indictment related to the same identical individual offence, the delivery of the judgment, and the awarding of the punishment in respect to each count, must have been accompanied by a qualification to the effect that the punishment awarded in respect to each count was identical with the punishment awarded in respect to every other. If, therefore, a defendant should be found guilty of one and the same offence, charged in twenty different ways in one indictment, and the Court should be of opinion that he ought, for such offence, to be imprisoned for one year, an imprisonment for a year would be awarded in respect of each count, but the award would be accompanied by the limitation that the year awarded in respect of each of the last nineteen counts was the same identical year — the same identical fragment of chronology for which he was to be imprisoned in respect to the first count. When several offences were charged in several individual counts, or several individual offences in several sets of

counts, the same principle must, of course, be applied according to the varying circumstances of each case, in order that, in each instance, the defendant should not suffer any greater amount of punishment than that which the court considered to be adequate to the nature of the offence or offences of which he had been altogether convicted. Such would be the form of the judgment in the circumstances which we have supposed, and which have been supposed by Mr. Justice Patteson. But every body knows that there never has been any instance of any such judgment being *actually* delivered *before* the case of *O'Connell v. The Queen*. *Since* that case, indeed, there *has actually been one*; for not only did this practice never exist before, but it has absolutely *been introduced* IN CONSEQUENCE *of the decision* of the House of Lords in Mr. O'Connell's case; and the very first instance, the only one in which it has yet occurred, is one in which Mr. Justice Patteson himself was obliged to pronounce judgment in this very form, in consequence of the House of Lords refusing to act upon his hypothesis that it must be supposed to have been so pronounced, in that same form, upon all former occasions.

The following are the circumstances of the case to which we allude:—

COURT OF QUEEN'S BENCH.

*Wednesday, January 29.*THE QUEEN *v.* CARTER.

THIS was an indictment against the defendant for unlawfully and fraudulently obtaining certain sums of money under false pretences. The defendant had pleaded guilty. The case was removed here by *certiorari*, and the defendant was now brought up in custody.

The Solicitor-General having moved the judgment of the Court,

Mr. Justice Patteson having read through the substance of the counts in the indictment, said, that it appeared that there was one offence charged in different ways in three counts; a second offence was charged in the fourth count, and a third offence was charged in the fifth, sixth, and seventh counts. The learned judge then said, that after the decision in the case of *O'Connell v. The Queen* he could not pass judgment upon the indictment in its present form. His Lordship, therefore, proposed that the Solicitor-General should enter a *nolle prosequi* upon all but one of each class of counts which charged the same identical offence in a different form.

The Solicitor-General said he had no power to do that.

Lord Denman asked why not? Was not the Solicitor-General, in the absence of the Attorney-General, to exercise all his powers?

The Solicitor-General said he was not empowered to do so in all things, and he believed that this was particularly the power which he was not entitled to exercise in the absence of the Attorney-General.

Their Lordships having consulted together for a few minutes, —

Lord Denman said, that as the case presented itself in circumstances which were *new to the practice of the Court*, it would stand over till to-morrow, there being some difficulty in saying how the judgment should be entered. The Solicitor-General might, in the mean time, consider what was the extent of his power in respect to the entering of the *nolle prosequi* in the Attorney-General's absence.

Upon the following morning the Solicitor-General renewed his motion, and as nothing further was said upon the subject of the *nolle prosequi*, Mr. Justice Patteson, as the senior puisne judge, proceeded to pronounce the sentence of the Court. The following is the report which appeared in "the Jurist" of the scene which was presented upon the latter occasion *: —

"An Indictment contained four Counts for Extortion, and three Counts for uttering forged Licences. The Jury having returned a Verdict of Guilty upon all the Counts, the Court passed Sentence of the same identical Term of Imprisonment upon each Count separately.

"An indictment against the defendant, an excise officer, contained four counts for extortion, and three counts for uttering forged licences. Another indictment against the same defen-

* Vol. ix. p. 178. The preceding part of the Report is taken from the Times and Morning Chronicle.

“ dant, for obtaining money upon false pretences, contained *ten* counts varying the description of the offence. The defendants having pleaded guilty to both indictments :

“ Sir F. Thesiger, S.-G., now prayed the judgment of the Court, consisting of Lord Denman, C. J., Patteson and Coleridge, JJ.

“ Patteson, J., delivered the sentence of the Court, which was, upon the first count, eighteen calendar months' imprisonment, with hard labour ; upon the second count, the same eighteen calendar months' imprisonment, with hard labour ; upon the third count, the same eighteen calendar months' imprisonment, with hard labour ; upon the fourth count, the same eighteen calendar months' imprisonment, with hard labour ; and, upon the fifth count, the same eighteen calendar months' imprisonment ; upon the sixth count, the same eighteen calendar months' imprisonment ; and, upon the seventh count, the same eighteen calendar months' imprisonment. His Lordship then passed sentence upon the prisoner in respect of the *second* indictment ~~in~~ *a similar manner*, and concluded with saying, ‘ The effect of the sentence is, that the term of your imprisonment will be for eighteen calendar months, with hard labour, though the Court has passed that sentence separately upon each count.’ ”

As the two indictments contained seventeen counts, and no *nolle* was entered upon any of them, it would seem that the learned Judge was obliged to repeat the same form of words all over, no less than seventeen times. When Carter's case was brought before the Court of Queen's Bench, on the 29th, Mr. Justice Patteson was of opinion that no judgment could be delivered upon the indictment as it stood. On the following day he delivered the judgment in the form which we have mentioned, being the first occasion upon which, in such a case, a judgment had ever been delivered in that form — in the very form which Mr. Justice Patteson recommended the House of Lords upon the 2d September, 1844, to

suppose to be that in which judgment had invariably been delivered at all antecedent periods, but of which the very first example was to be furnished, in fact, upon the 30th January, 1845 — Mr. Justice Patteson himself being the very person who was destined to give the first actual example of what he previously said that the House of Lords were bound to take for granted as a mode of proceeding which had been theretofore invariably adopted.

The opinion of Mr. Justice Maule, in answer to the third and eleventh questions proposed to him by the House of Lords, was expressed in a very few sentences. But short as the opinion is (occupying little more than half a page), it contains portions which seem not to be either very relevant or very clear, and statements which, from a mistake of the printer, or some other cause, are undoubtedly incorrect. That the very eminent abilities of the learned Judge were called but to a very small extent into requisition upon the occasion is perfectly certain. The principal, if not the only ground upon which the learned Judge was of opinion that the judgment of the court below ought not to be reversed was, that “the question “ of the *amount* of punishment was not a fit subject for the consideration of a Court of Error, “ which has not before it the evidence adduced at “ the trial, or the other matters which determined “ the amount of the punishment” in the court below.

But the question upon this point was, not whether the *punishment* of the court below was *too great or too small* for the offence to which the punishment was attributed, whatever that offence may be, but *whether the record did not expressly and unequivocally state that the defendants had been punished for the conduct which was described in the sixth and seventh counts, which conduct WAS NOT ILLEGAL AT ALL, and whether they were not also punished for the conduct set out in the first, second, third, and fourth counts, upon which the findings had been so returned by the jury, or so entered upon the record as to render it UNLAWFUL IN THE COURT OF QUEEN'S BENCH to inflict ANY punishment in respect of any thing alleged in any of those counts respectively.*

The learned Judge observes, that "the universal practice is for the Court" [below] "to look beyond the record in such cases, in order to determine the amount of the punishment from the circumstances of the case." But in order *properly* to determine that amount they must of course, when they consider bad counts to be good, as they most indubitably did upon the present occasion, take into consideration *all* the circumstances relating to *all* the counts, good and bad, and must therefore, *according to this very hypothesis*, have awarded *some portion of the punishment* in respect of the *bad counts*, and therefore in respect of conduct which was *not forbidden by the law*. The learned Judge is, notwithstanding, of opinion that such a judgment ought not to be disturbed, be-

cause in that case "it might well be that a judgment would be reversed by a court which, in the place of the court below, would have sentenced the defendants to the very same species and amount of punishment." In the infinite varieties of possible contingency, in respect to a matter which it is difficult to render subject to any rational speculation, there may undoubtedly occur a coincidence which would not only be fortuitous but miraculous. All the light, however, which can be had upon such a subject appears to demonstrate the absolute impossibility of the two courts ever exactly fixing upon the same kind and amount of punishment where both courts had a discretion upon both points, where, as in the present case, the counts expressed different charges, and where the court below thought all the counts good, and the court above is of opinion that some of them are bad.

Let us take the case of an indictment containing five counts, each of which imputes a separate and a different offence. The defendant is convicted upon each count: the court below considers each to be unexceptionable, and sentences the defendants to a certain amount of punishment upon the whole for the five separate offences of which he has been found guilty. Let us now suppose the court above to be of opinion that four out of the five counts are bad, and that the court above, according to the supposition of Mr. Justice Maule, is "put into the place of the court

“ below ” for the purpose of passing sentence upon the defendant in respect of the remaining count, containing, according to the opinion of the court of error, the only offence of which the defendant was guilty. How is it possible to believe that the court above could “ sentence the defendant to the very “ same species and amount of punishment ” for one offence which the court below had awarded against him for five, amongst which the very one in question was included. Supposing the two courts to be equal in respect to sagacity, impartiality, and all the other qualities which are necessary to enable a court to award an adequate and appropriate punishment, the court above would of course agree with the court below as to the propriety of the punishment awarded in respect of the five counts, if the five counts were all good. But the court above considers that four of them are bad, and that no punishment ought to be inflicted except for the remaining one. In the case, therefore, which has been supposed by Mr. Justice Maule, the amount of punishment awarded in the court above must universally, and, as a matter of unquestionable necessity, be less than the amount awarded in the court below by exactly the amount which the court below awarded in respect of the bad counts, which in the case that we have been supposing would be about four-fifths of the whole.

But in order to demonstrate the utter groundlessness of Mr. Justice Maule’s theory, it is not

necessary to have recourse to a hypothetical case, or to travel beyond the four corners of the record in the case of *O'Connell v. The Queen*. Upon the face of that record Mr. Justice Maule could have seen a charge of conspiracy to procure a change in the laws by intimidation to be effected through the exhibition and demonstration of great physical force at the monster meetings, which charge Mr. Justice Maule himself decided to be a nullity. This charge he would have seen in the first, second, third, fourth, sixth, and seventh counts of the indictment, and *in no other count*. Now Mr. Justice Maule has himself decided that the first, second, third, fourth, sixth, and seventh counts of the indictment *are to be considered as mere nonentities*, and he has therefore decided that the charge about the exhibition of *great physical force* at the monster meetings must be considered *as if it had never existed upon the record*.

Let us now suppose that the court above was, according to the learned Judge's theory, to be put into the place of the court below, for the purpose of awarding the punishment. In order to do so with propriety, "the Court" [to use the language of the learned Judge himself] "must, according to the universal practice, look beyond the record in order to determine the amount of the punishment from the circumstances of the case." The Attorney and Solicitor General would be consulted of course, and would, as the first "circumstance of the case," inform the Court of Error that the whole prosecu-

tion had been instituted for the purpose of trying the legality of the multitudinous meetings, as described in the first, second, third, fourth, sixth, and seventh counts of the indictment. The Court of Error, having decided already that the *six counts above mentioned* were to be treated as *non-existing*, would go on to require information about the charges contained in the remaining counts, namely, the fifth, eighth, ninth, tenth, and eleventh. The Court itself would see that these charges were first a conspiracy to excite a seditious opposition to the Government by other means, as well as by writings and speeches of an inflammatory character; secondly, a conspiracy to excite ill-feelings amongst different classes of her Majesty's subjects, and especially to promote ill-will amongst the Irish against the English; thirdly, a conspiracy to set up arbitration courts, and recommend the people to submit their differences to those courts rather than to the courts already established in Ireland by the Crown; and fourthly, a conspiracy to intimidate the Legislature by speeches and writings.

In regard to the first of these charges, the Court would learn that Mr. O'Connell, repeating the opinions of Saurin, of Plunket, and of Bushe, had said that an Irish act of Parliament was void; but the Court would perhaps not forget at the same time that hundreds of most influential persons in England are in the habit of saying with impunity that one English act of Parliament is murderous, and another was passed for the purpose

of preventing the population from having enough to eat. They would inquire what evidence had been given of any recommendation by Mr. O'Connell to make any resistance to the law; and they would be not a little surprised to hear that an unconditional obedience to the law had been the great principle to which, throughout the whole period of his life, he had exacted a universal and unhesitating conformity from all his followers; that indeed the most provoking part of the man's conduct was that, like a peaceable dog, in the manger of riot, having no appetite for that particular entertainment, he not only himself abstained from indulging in the enjoyment of tumult, but would not allow any one else to partake in the gratification; and that such perverse and persevering "total abstinence" from illegality upon the part of the leader and the followers was, in the opinion of the Attorney-General*, that which constituted the most formidable part of the hypothetical conspiracy; rendering it necessary, as the reader will have already perceived, to *construe* Mr. O'Connell's conduct into illegality, and so producing that continual interlacing of contradictory sophistries which we have endeavoured to disentangle, and in the course of which the logicians of the Crown were compelled to contend fifty times, not only that white was black, but that the reason of its being so *very* black was that it was so *particularly* white.

* Vide *suprà*, p. 4—5.

But in continuing its inquiry into "the circumstances of the case," the Court would probably hear, that although Mr. O'Connell had not recommended any opposition to Government, there were others who did so with impunity; and as the Chief Justice had shown during the trial some concern about the circulation of the *Evening Mail*, the court above might perhaps have an opportunity of seeing in that paper that a Dublin judge — the same gentleman who revised the lists of which the Court had already heard so much — had declared at a great public meeting "that he trusted the people *knew their duty too well* TO SUBMIT to the enactments of *the Government*,"* and that the right honourable gentleman had never been prosecuted for such declaration. The Court would also not fail to take into its consideration what was going forward in the world without, and would probably see, by the reports of the London papers, that within a few days of this present 15th of March, 1845, a noble Earl, who is the Lord Lieutenant of the "proper" county in which the Prime Minister has his residence, presided over a meeting, at which it was unanimously resolved that the recent measures of the Government amounted to a confiscation of property, and that another multitudinous meeting, presided over by a noble Duke, who is also a Lord Lieutenant, and whose brother is a Lord of the Trea-

* Arm. & Trev., p. 327.

sury, expressed their determination *not to submit to any further extension of such measures*; and declared that if the farmers of England had shown a little sooner, the formidable front which they exhibited upon the present occasion, no government would have dared to act as the present Government had done. Mr. O'Connell would, probably, not fail to cause it to be communicated to the Court, that although himself and the other defendants were charged with convening the monster meetings for the purpose of procuring a seditious resistance to the Government, no intimation was given to the parties that they were acting illegally, except one, which was immediately obeyed; that the Government had never interfered in any manner with respect to any of those meetings, except the actual meeting at Skibbereen*, and the projected meeting at Clontarf; that the meeting at Skibbereen, as the reader has been already informed, was holden with something like the deliberate sanction of the Government; and that when a proclamation was issued against holding the meeting at Clontarf [the only official intimation which the Government had given] "every one of the defendants, in his way, laboured to effect the "common object," of showing obedience to the proclamation [which conduct was considered as

* Vide *suprà*, p. 168.

decisive evidence of a conspiracy to resist it], and that one of them sacrificed his life to the efforts which he made upon the occasion, in recompence for which efforts the Government very gratefully rewarded him with a prosecution for a seditious conspiracy. The court above, so placed in the situation of the court below for the purpose of awarding the punishment, would naturally turn to the clergy of the Irish establishment for a perfect exemplification of submission to the laws and the authorities; but the Court would, perhaps, learn, from some source or other, that a very large portion of that reverend body was at present "labouring, "each in his own way, to effectuate the common "object," of exciting opposition to that part of the measures of the Government, and laws of the land, which relate to the education of the people, and that they denounce those laws and measures not only as being in opposition to the law of God, but as tending to destroy the word of God itself, and as being, therefore, such as not only to justify, but to render meritorious, the resistance of all Christian mankind. The Court would be, moreover, informed by the Solicitor-General, that although he is himself a member not only of the Government which has adopted those atheistical measures, and procured the enactment of those laws for the mutilation of the Divine Word, but also a member of the Board whereby the laws and measures are to be carried into effect, he has never felt it to be his duty to

prosecute any of the reverend persons who, according to his own theory, may be so easily inferred to have conspired together, from the fact that "each of them has been for a considerable time labouring, in his own way, to effectuate the common purpose," of procuring resistance to the laws and measures in question.

With reference to the charge of exciting ill feelings between different classes of the people, the Court, upon a very slight examination of some affidavits which would perhaps be filed in mitigation of punishment, would find that the excitement of ill feelings in one class of the people towards the other was a permanent occupation with persons rather high in the world, who, for committing the offence, instead of being prosecuted, had been promoted. They would find in the Chief Justice's paper, the *Evening Mail*, and in every "paper of that sort," that a deputy-lieutenant of the county of Down pledged himself at a great meeting, which was presided over by Lord Roden, that, if it should be desirable, he would "*drive the Papists out of the land.*" That he went on to say; that the boast was not a vain one,—that he was satisfied that the thing could be done, as the Orangemen were *three millions* and the Papists *only five*; and that if he had been aware that Lord Roden was to preside, he would have had a body of at least 60,000 Orangemen to bid him welcome. That Lord Roden upon that occasion made, according to the accounts, no at-

tempt to express any dissent from these minatory calculations, but, on the contrary, at the close of the proceedings, recommended the multitude to treasure up in their hearts the *excellent advice and cheering assurances which they had received*; that at a great meeting of the Protestants of Ireland, which was held at the Mansion House in Dublin, ten days afterwards, he expressed his exultation at the display of *physical force* which had justified Mr. Crommelin (the deputy-lieutenantaforesaid), in boasting that the party to which he belonged were willing and able to "*drive the Papists into the sea.*" "It is gratifying," said the noble lord, "to think, and, oh! it was gratifying to see, at the meeting in the North to which I have alluded, that we have with us the *Protestant sinew and strength of the country,*"—that strength and sinew upon which Mr. Crommelin relied for effecting the clearance which he seemed so anxious to accomplish. That no mitigation has since that time taken place in his lordship's sentiments, appears plainly enough from the fact, that four years later, when speaking of the clergy of the Roman Catholic persuasion in Ireland, he said, "They dictate to the rulers of the land, and send members to Parliament, who must, in return, obey their dictates. They watch over even the private conduct of Protestants, and know all their proceedings and domestic secrets by the agency of the confessional. The Protestants court them from fear, and contribute to their exactions. *There can*

" be no security for the country, nor no hope for its civilisation and prosperity, TILL THIS ORDER IS PUT DOWN — DELEND A EST CARTHAGO."

That these and similar recommendations of extermination had produced their appropriate consequences in the passions of the ferocious multitudes to which they were addressed ; that in the " Times " of the 27th of January, 1845, it was stated that the Protestant Operative Association of Dublin had lately published a set of resolutions, the effect of which was a recommendation to exterminate the Roman Catholic population of Ireland.

Coming to the, so called, offence of setting up the practice of arbitration, the Court, along with certain other matters which we have already mentioned, and shall now not repeat, would find that the only practical development of that part of the combination was the appointment of the Areopagus of Blackrock, which awful tribunal " had usurped the " prerogative of the Crown in the administration of " justice " to the very formidable extent of seditiously adjourning the only cause that was brought under their notice, " to the evil example of all others in " like case offending," if any others there shall ever be. Upon the subject of bringing courts of justice into contempt, they would, perhaps, recollect that some of the most ancient and important courts in England itself — those exercising a spiritual jurisdiction — have come into such a degree of contempt

as to be considered almost in the light of public nuisances: that they themselves (the judges of the Court above, now put into the place of the Court below) were not perhaps without participating in this opinion; and that at this very moment Lord Brougham is combining with some other persons, not merely to “induce” but to compel “her Majesty’s subjects to withdraw the adjudication of one large class of their differences with, and claims upon, each other, from the cognisance of the said tribunals by law established, and to submit the same to another tribunal constituted and contrived for that purpose,” of which latter tribunal Lord Brougham will himself be undoubtedly the most active and influential member.

Upon coming to the last charge of all — that of intimidating the Legislature by speeches and writings, for the purpose of effecting a change in the laws, — the Court would begin by inquiring what law it was that was pending before the Legislature at the time of the supposed offence, and which the Legislature was to be coerced into passing or into rejecting by the force of the intimidation. They would be surprised to find, upon this subject, that there was no such measure at all, either permissive or prohibitive; and that, in fact, the very case of the Crown Lawyers, as repeated fifty times all over by themselves and by the Court was, that the changes in question which the defendants were charged with endeavouring to effect by intimi-

dating the Legislature, were to be effected without any intervention of the Legislature being either prayed or permitted. They would therefore see that, if the case of the prosecutors themselves was true, this part of the charge must be false.* They would see, at any rate, that it was *physically* impossible to intimidate a legislature into passing or into rejecting a measure which did not exist, and was not even projected; and they would still further learn, that during a considerable portion of the period within which the speeches and writings were uttered and delivered for the alleged purpose of intimidating the Legislature, in reference to a law which was not contemplated, there was no such thing in existence as the Legislature itself. The Court, however, may not perhaps be disposed to adopt this view of the law without some limitation: they would, therefore, enter into the circumstances of the case as disclosed upon the evidence, where they would certainly find but small traces of any language at all approximating, in its minacious character, to that which they read of as forming the regular dialect of some very important associations in this country.

We have already presented the reader with some sufficiently striking samples of the language, which in *England* is used with impunity, for the declared

* The way in which the Chief Justice put the matter to the jury in one part of his charge (p. 170.) was, that the defendants "took it into their own hands entirely, without the assistance, "advice, or co-operation of King, Lords, or Commons."

purpose of intimidating the Legislature and the Government. The following extracts are taken from speeches delivered at a recent meeting of the Anti-Corn Law League, in Manchester. The meeting was composed of about 6000 persons, and the extracts are taken from the Report contained in the Morning Chronicle of the 7th of March instant. One speaker says, " You want but unanimity and determination to carry any object you take in hand." Talking of the League itself, he observes, " You feel in your own minds its growing *strength*. " The nation feels and recognises its evidence in *the House of Commons — itself the last place to show the results of a movement*. Yet *there*, who does not perceive in the present session that the tone and style of the leaders of political parties has undergone a material *change* [cheers]; that *we find deference where once there was superciliousness*; that the Treasury bench looks on not haughtily, whilst the leader of the opposition declares that protection is the bane of agriculture [loud cheers]. A higher standing has assuredly been achieved for the friends of free trade, as opposed to *the friends of scarcity, in the Legislature of the country* [cheers]. That indication is valuable for the very reason that *more slowly than in any other class in society does the progress of knowledge and of truth act upon that body*. The House of Commons marks time like a septennial clock, that only strikes at long intervals [cheers]

“ and laughter]. When the hands do begin to move
 “ forward, however, it is with a *sort of jump*, and
 “ not with the *steady progress that marks the ad-*
 “ *vance of truth amongst the people*; and we may
 “ anticipate that on this matter, as on that of Ca-
 “ tholic Emancipation, and some other topics, whilst
 “ year after year we are tauntingly asked how
 “ many votes have you got, how many votes have
 “ you changed? *that at last will come all at once the*
 “ *word of command from head quarters to ‘right*
 “ *‘ about face!’* The ground will be cleared, and
 “ we shall find that what they have been for whole
 “ years denouncing as the ruin of the constitution
 “ and the agriculture of the kingdom — we shall
 “ find them enlightened to the essential importance
 “ of free trade, and declaring that it is the only
 “ rational policy which such an empire can adopt
 “ [cheers]. However it may be *in the Legislature*,
 “ the symptoms of progress are *decided enough every-*
 “ *where else*. They are evident, not only in the
 “ *immense numbers* that attend *meetings*, both here,
 “ in the cradle of the Anti-Corn Law League, and
 “ those meetings in London which have gone on to
 “ such an *unparalleled extent*, but they are not less
 “ distinct in the character than *in the multitudinous-*
 “ *ness of the meetings*. They are marked by *no*
 “ *sudden outbreaks of popular enthusiasm*. We feel
 “ that *not merely the purposes of this League*, but
 “ *every purpose* that is connected with the march
 “ of the national mind, is advancing towards its

“ accomplishment, that the dominion of *sophistry*,
 “ that the reign of *humbug* [loud cheers] *is over* —
 “ over for ever in this country; and *no* LEGISLATOR
 “ *or professed* STATESMAN *will in future* DARE to try
 “ *the* CAJOLERY *that has been practised in past times*,
 “ when he knows that the flimsiness of his argu-
 “ ments will instantly be seen through, and his
 “ insufficient assertions will have their speciousness
 “ detected. He will feel that his best interest is
 “ to be honest, because he has to deal with a de-
 “ velopment of mind that is *no longer to be paltered*
 “ *with* [cheers].” In comparison with such language
 as this, any *Irish* Repealer, even Mr. O’Connell
 himself, “ roars you like a sucking dove.” Even
 the Chief Justice wound up his charge upon this
 part of the case by reading the conclusion of an
 address which was printed and circulated in Sep-
 tember, 1843, which appeared in almost all the
 newspapers of the empire, and which concluded in
 the following terms:— “ But, Irishmen, we suffice
 “ for ourselves. Stand together — continue to-
 “ gether, *in peaceful conduct, in* LOYAL ATTACH-
 “ MENT TO THE THRONE, *in constitutional exertion*,
 “ AND NONE OTHER.” The Chief Justice having
 read this passage exclaims, “ Is this the language
 “ of intimidation, or is it not?” It would be quite
 ridiculous to attempt any serious answer to such a
 question. If the Chief Justice’s idea of intima-
 dation is to pass for a rational one, we know not why
 people should consider that there was any thing
 comical in the decision of the legal functionary in

Shakspeare*, who decided that to impute to a gentleman that he gave money to procure a calumnious imputation upon a lady's character, was "flat bur-glary."

The reader is of course aware, that besides this Corn Law Repeal Association, there is an Anti-Corn Law Repeal Association, which, according to the small extent of its courage and capacity, and the somewhat smaller of the sincerity of its principal members, adopts the same course which is pursued by its antagonist, and for exactly the same purpose, of intimidating the Legislature. As all these matters are of course perfectly notorious, we shall at present only call the reader's attention to the fact that the proceedings of both Leagues having become the subject of discussion *in the Legislature itself* upon the 17th of March, 1845, not only did all parties assert that the intimidation of the Legislature was the professed object of all the "speeches" and writings" of both associations, but the Prime Minister himself actually read a document for the purpose of proving, that the real purpose of the society presided over by the Duke of Richmond was to "arrest the *specific* measures *then actually in progress* through Parliament," and that, for the accomplishment of this purpose, the society was labouring by itself, and by all its affiliated branches, as well as by *deputations which were sent all through the country*, for the purpose of exciting resistance to the actual and intended measures of the Legisla-

* "Much Ado about Nothing," act iv. scene 2.

ture and Government, by acting upon the fears of the individual members.

Although, after the instances which we have already adduced, it may seem to be nothing better than “wasteful and ridiculous excess” to accumulate any additional evidences of the universality of the conduct which we are treating, we cannot help referring to the proceedings of a meeting which took place at Exeter Hall upon the 18th of March, in reference to the measure now before the Legislature for increasing and rendering permanent the grant to the College of Maynooth. The Honourable and Reverend Baptist Noel having moved a resolution to the effect that in the opinion of the meeting *any assistance or countenance* given to the Roman Catholic clergy was calculated to *bring down the* JUDGMENT OF GOD *upon this Protestant country*, the Reverend Mr. Bickersteth next addressed the meeting. He said that this grant was a national sin — that Popery was the abomination of abominations — that the grant was for the support of idolatry, and would be *so much money spent in* UNDERMINING THE THRONE — *so many* BARRELS OF GUNPOWDER *prepared to overthrow the* British constitution, as those with which Guy Fawkes intended to have blown up the Parliament. It could not be expedient to concede the grant to Maynooth, for it was *paying to teach* REBELLION TO GOD *and to* THE STATE. He concluded by stating, that the Government had made a *fictitious*

excuse for bringing forward the grant. Sir Culling Eardly Smith said, that it was the duty of all Protestants to *oppose* it, and recommended that a committee should be appointed to sit every week (like the National Repeal Association), and send *able men throughout the country* to stir up a general opposition to the grant, which recommendation was adopted by the meeting. It seems to be scarcely worth while to cap this climax of intimidation by referring to a meeting in which the Irish Attorney-General himself took a part, and at which a noble Earl described the existing Parliament as “a rebellious Parliament,” and added, that the then “Lord Lieutenant was the slave and minion of the rebellious Parliament.” Mr. Smith exhibited upon the same occasion some small bigotry upon his own account ; but none of the individuals who combined together for the purpose of intimidating the Legislature by writings and speeches were ever made the object of a prosecution for such conduct.

Upon inquiring into the character and conduct of the respective defendants, the Court would be informed by Mr. Justice Burton that Mr. O’Connell was a person who never broke the law himself, or allowed any one else to do so : upon which information the Court would consider, that it would be rather a flagrant injustice to sentence him to the punishment of giving security to the amount of 10,000*l.* upon the pretence (admitted to be false)

of preventing him from committing a breach of the peace. The Court above would of course have heard a good deal about the chivalrous qualities of Mr. Steele's character, and would perhaps look upon him as the most valiant and most dangerous of the defendants. The Court would, however, learn from the Solicitor-General that "he," the Solicitor-General himself, "was quite satisfied — quite certain — that Mr. Steele would not wantonly put himself at the head of any movement that would *disturb the public peace or INJURE ANY HUMAN BEING.*"* The Court would, upon hearing this, naturally wonder why he was prosecuted at all; and would, perhaps, not wonder the less upon hearing from the Solicitor-General† that "he had known Mr. Steele for many years, and highly respected his manliness of character as well as his pacific disposition; but that he, the Solicitor-General, had included him in the indictment, not because of any specific offence which he had committed, but because it was *thought* impossible that any gentleman who had *taken so prominent a part* in the whole of the general movement *could be omitted.*"

The Court, having in vain attempted to digest this new principle of action, by virtue of which a man is prosecuted because his political friends happen to be in the same predicament, would scarcely think that this kind of Irish conformity

* Reply, Flan., p. 421.

† Ubi *suprà*.

was a matter to be commended in the administration of criminal justice; but would at any rate suppose that Mr. Steele had been acquitted by the jury. Their Lordships would, however, be informed, that "the jurors aforesaid" not only returned a verdict against Mr. Steele upon every count in the indictment, but actually found him guilty of more offences than were imputed to him.

It would, then, become, of course, indispensable to ascertain more perfectly the nature of the "prominent part" which he had taken throughout the movement, and the Court would be informed that Mr. Steele's exertions had been principally and most effectually directed to the preservation of the peace. But the Attorney-General would inform their Lordships as he had already informed the Court below, that "the determination to preserve the peace was, in fact, the most formidable, and, therefore, the most criminal, part of the whole conspiracy."* The Court, being completely mystified and bewildered by this farrago of absurdity and iniquity, would be glad to pass on to some other of the defendants, and would learn that Mr. Barrett was charged with sedition for expressing upon the subject of military duty the principles of the Bible, of Grotius, of Gisborne, of Blackstone, and of Brougham; and Chief Justice Pennefather would himself inform the Court above that, as a matter

* Vide *suprà*, p. 5.

of fact, Mr. Duffy was in so delicate a state of health as never to have been able to attend one of the meetings which he was charged with conspiring to convene. With regard to the Rev. Mr. Tierney, the Court would be informed by Mr. Justice Crampton that in his, Mr. Justice Crampton's opinion, justice was not done to Mr. Tierney, either by the Court or the Jury*; that the Court, that is to say, the Chief Justice in his charge to the Jury, ought to have been "more explicit;" and that the Jury ought to have acquitted him, notwithstanding the fact, that "justice was not done to him" in the charge; that he had joined the association after every one of "the overt acts," such as they were, "had been done;" that the evidence against him was "of so very trifling a nature" that the Jury ought to have acquitted him; and, finally, that he, Mr. Justice Crampton, having omitted to interfere at the proper time to prevent injustice from being committed against Mr. Tierney, "could not now rest satisfied "as a *conscientious man*, unless Mr. Tierney was released from the pressure of that verdict;" and that, sooner than Mr. Tierney should not have a new trial, he, Mr. Justice Crampton, would even grant a new trial to the other defendants who, in his opinion, did not deserve it. Of Mr. Tyrrell, the Court would hear that he had been deprived of his life, partly from the effect which the mere commencement of

* Judgment of Mr. Justice Crampton in refusing the motion for a new trial, reported in the Morning Chronicle, May 27.

the prosecution had produced upon a frame which was not naturally vigorous, and partly from the exertions which he had previously made to induce, in the popular mind, a sincere obedience to the Government which prosecuted him for a seditious resistance. Of Dr. Gray and Mr. John O'Connell, the only arbitrators among the defendants, the Court would learn that they had "combined together" to adjourn, without a hearing, the only cause which they were ever asked to hear; and concerning the only remaining defendant, Mr. Ray, the Chief Justice would state that *his* share of the combined illegality was only a *mite*.

With regard to all the defendants, the Court would learn that they severally and specifically denied, in eight separate affidavits, the truth of the charge for which they were indicted, and the Court would, probably, be of opinion that the solemn depositions of nine respectable individuals ought to pass for something in answer to an inferential imputation of a constructive and conjectural offence, which was founded upon a hypothesis; which "eye had not seen or ear heard," and which "it never entered into the heart of any one but the Attorney-General to conceive:" and, which was never even pretended to have a "local habitation," although the law gave it a "name" upon the presumption of its existence.

Having now presented to Mr. Justice Maule an outline of the sort of circumstances which "the

“ Court above, put into the place of the Court below,” would have to consider before the passing of the sentence, we venture to hope that we may safely assert that no *English* Court could, in the present case, have inflicted one hundredth part of the punishment to which the defendants were sentenced by the Irish Judges — a punishment which, as we have already shown, was as extravagantly disproportionate as it was extravagantly absurd.

Coming next in order to the “ Information ” given by Mr. Justice Williams to the House of Lords, we find the learned Judge using the following language: “ And what, I may be permitted to ask, is there which gives your Lordships to understand, and be informed, that judgment *may* not have been — actually was not — given exclusively upon those counts, and the findings thereon, to which (according to the opinions of all the Judges at least) no possible objection applies? Why is it to be *assumed* that the judgment has proceeded upon some or all of the erroneous parts of the record?” In answer to this we beg leave to say that the Record itself was that which gave their Lordships to understand that the judgment had been given upon all the counts, good and bad. The record minutely stated that the defendants were charged with having committed certain offences therein very particularly set forth. It then proceeded to state, with much more particularity, that the Jury had found the defendants guilty of all the offences

aforesaid, in manner and form as the said offences had been respectively charged against the said respective defendants. It then proceeded to state, that the Court having seen, and fully understood all and singular the premises, had sentenced each defendant, for his "offences aforesaid," to a certain amount of imprisonment and fine. Whatever may be the true and legal meaning of the expression "his offences aforementioned," there can be no earthly doubt that, *primâ facie*, it imports the offences which had been mentioned before, and of which the Jury had declared upon the antecedent parts of the record that the defendant was guilty. Mr. Justice Williams, however, is of opinion that the words "his offences aforesaid" are upon that record exactly equivalent to the words "such offences as are charged against him in five-elevenths of the counts of the indictment aforesaid." And this most violent construction is based upon the equally violent supposition that, as no judgment could have been legally given upon the 1st, 2d, 3d, 4th, 6th, or 7th counts of the indictment, it must be taken to have been given in respect of the 5th, 8th, 9th, 10th, and 11th, to neither of which, according to the opinions of the English judges, no objection applies. Let us try the correctness of the construction, and of the presumption, by a test which, to ourselves at least, appears quite unexceptionable.

Let us suppose that there were now, as in Lord

Mansfield's time there actually were, two Courts of successive appeal in the present case; that a writ of error had been first brought upon the judgment from the Queen's Bench in Ireland to the Queen's Bench in England, and afterwards from the Queen's Bench in England to the House of Lords. In the present instance the Court of Queen's Bench in England would confirm the judgment of the Court below, as the three puisne Judges of the English Court have expressed their opinions that the Irish judgment must be taken to have proceeded upon the 5th, 8th, 9th, 10th, and 11th counts, which they declare to be good, and well found; and not to have proceeded in any any degree upon the 1st, 2d, 3rd, 4th, 6th, or 7th, which are either ill found or ill framed.

Let us now suppose that the case goes on from the English Queen's Bench to the House of Lords, and that the majority of the Law Lords in that House agree in opinion with Lord Brougham and the four Irish Judges, that the 6th and 7th counts are unexceptionably good, that they see nothing bad in the finding of the first four counts, and that they are also of opinion that all the others are unquestionably bad. The House of Lords would declare that the judgment of the Irish court was good, because it must be presumed to have proceeded exclusively upon the 1st, 2d, 3d, 4th, 6th and 7th counts; and the English Court of Queen's Bench would decide that the same judgment was good

upon the ground that it must be presumed not to have proceeded in any degree upon any of those counts at all. The Supreme Court of Error would affirm the judgment upon the ground that the Court below must have held the 6th and 7th counts to be unexceptionably good, and all the others to be unquestionably bad, and the 1st, 2d, 3d, and 4th to be legally found : and the intermediate Court of Error would affirm the same judgment upon the ground that the Court below must have held the 6th and 7th counts to be unquestionably bad, and all the others to be unexceptionably good, and the findings upon the first four counts to be good for nothing. We should then have a presumption of law which was negative at one side of a particular wall, and positive at the other. So that the effect of the presumption would be upon the whole, that the Court of Queen's Bench in Dublin considered the 6th and 7th counts to be at one and the same time unexceptionably good and unquestionably bad ; and the findings upon the first four counts to be at the same instant legal and illegal !

In the meantime, the persons who repudiate the literal and obvious construction of the record, but who won't go beyond it for information, have no means whatever of ascertaining as a fact, with which of the Courts of Error the Court below is in accordance upon the point ; or whether it does not in some degree both differ and accord with each, or whether it does not in every particular differ from

them both, respectively, as widely as they differ from each other.

Mr. Baron Gurney's opinion proceeds upon the supposition that the question in controversy was the adequateness of the punishment — a matter about which there was no question at all : whilst Mr. Baron Alderson, who states in one place * “ that the “ Court below always give their judgment upon the “ good counts;” — for which purpose it is of course indispensable that they should examine the record in order to see which counts *are* good and which not, — anticipates, in the same place †, as the consequence of setting aside the judgment of the Queen's Bench in Ireland, “ that the Court *below* *will be* “ *obliged* to examine and decide upon the record in “ some cases without even the benefit of an argument,” — that, as a consequence of reversing the judgment against Mr. O'Connell, the Court will, as a matter of fact, be *compelled* to do, *occasionally* and *imperfectly*, what, as a matter of presumption, it is *supposed to do universally, and completely*. This argument so nakedly reveals its own want of any foundation as not to require any other answer besides that which it gives to itself.

It appears humbly to us, that not only does the “ presumption ” of which we have been speaking conduct in every direction to a wilderness of absurdities, but that the very terms in which it is expressed, are deprived of all intelligible meaning

* Opinions of the Judges, p. 25.

† Ibid, p. 24.

by the use to which they are applied. What sense are we to attribute to the expression "good counts" in the argument of the Lord Chancellor, and of all those who take that side in the discussion? "Good," in such a case, must mean "good according to the decision of some tribunal having power to decide upon the goodness." If, therefore, the expression as it is used can mean anything at all, it must either mean counts that are good in the opinion of the Court below, or counts that are good in the opinion of the Court above.

It may be conceded that the Court below delivers its judgment upon the counts which *itself considers to be good*. But if this fact be sufficient to make the judgment good, there must result of necessity one of two consequences of the most monstrous character; first, that the Court below cannot make any mistake upon the goodness of the counts; in which case the existence of a Court of Error, which professedly exists only for the purpose of rectifying those (non-existing and impossible) mistakes, would be a gigantic outrage upon common sense. But secondly, if the Court below should be capable of error, it must equally and inevitably result, that wherever that Court gave a judgment of conviction upon an indictment, consisting of one bad count, or consisting of several counts all bad, the Court above would be obliged to declare expressly that a judgment was good which it knew to be bad. To suppose, therefore, that by "good counts" we are

to understand counts good in the opinion of the Court below, is altogether and obviously impossible.

Equally impossible must it obviously be, to suppose that the expression can mean counts good in the opinion of the Court above ; as nothing could be more extravagant than the supposition, that the Court below gave judgment upon the counts in reference to the opinion of their goodness which may be formed by a Court of Appeal ; when the Court below could not know what the opinion of the Court above would be upon the subject, or whether it would ever give or ever be asked to give any opinion upon the subject at all.

But if we proceed upwards to the alleged fountain of this imaginary doctrine, we shall find that the position which Lord Mansfield is said to have laid down, or rather the intimation which he very improvidently threw out, affords as little ground for the consequences which have been supposed by the judges to follow from it, as the opinions of the judges afford for the fabric which Lord Lyndhurst has erected upon the opinions themselves. It seems to be admitted upon all hands, that if Lord Mansfield's dictum were spoken with reference to a motion in arrest of judgment only, it was altogether inapplicable to the case of a writ of error, which is a proceeding of a totally different nature. That he did not speak with reference to a writ of error appears to be entirely out of doubt ; first, because he says nothing which

indicates that he had any such proceeding in his mind ; secondly, because there never was any instance of a writ of error upon that subject at all until the present case of the Queen *v.* O'Connell ; and, thirdly, because it appears that the very proceeding before Lord Mansfield, when he uttered the dictum, *was* a motion in arrest of judgment, where the several counts in the declaration were all, as appeared upon the face of them, for the same subject matter, and where the two counts objected to were held by Lord Mansfield himself to be good. If, on the other hand, it can be supposed, in defiance of all probability, that Lord Mansfield intended his dictum to be extended to writs of error, as well as to motions in arrest of judgment, a very slight inspection of the arguments which have been used to show such to have been Lord Mansfield's intention, will be sufficient to demonstrate that he ought to have drawn from the premises in question a conclusion diametrically opposite to that which he actually deduced. He is supposed to have placed the alleged difference between civil and criminal cases upon the ground that "in civil cases, "if there be one count bad, and the verdict be "general, no good judgment can be given, because "the court having no power over the damages, or "means of apportioning some part of them to one "count, and some to another, knows not for which "portion the judgment ought to be given, and is "compelled therefore to set the whole verdict aside."

Now, upon this point, it appears to be instantly obvious that the position of a Court of Error, in a criminal case, with reference to the sentence and the punishment, is absolutely identical with that of a Court in Banc, in a civil case, with respect to the verdict and the damages. Upon this subject Lord Cottenham made the following conclusive observation: * “ It appears to me that a Court of Error, “ in criminal cases, is in precisely the same situation ” (as the Court in Banc). “ It has no more “ jurisdiction over the quantum of punishment, and “ no better means of referring one portion of it to “ one count, and one portion to another, than the “ Civil Court has, after a general verdict, over the “ damages in an action. In both cases the preliminary or inferior jurisdiction has proceeded “ upon an instrument (the indictment or declaration) found to be in part deficient, and having “ come upon the whole to one result, which the “ inferior Court cannot separate or apportion, the “ same necessity exists in the one case as in the “ other, of holding the whole to be void.”

The most which can therefore be made of the argument upon the part of the Crown, is that Lord Mansfield asserted, without any authority for such an assertion (if it is to be supposed that he spoke with reference to a writ of error), that the practice was in criminal cases different from what it was in

* Judgment, p. 6.

civil ; but that every reason, of every sort, alleged in support of his obiter dictum, demonstrates that there *ought not* to be any difference at all, so that the very foundations of the theory are as fictitious as the fabric itself.

But whatever direction ought to be given to the meaning of the dictum, it is quite obvious that it must, as to the extent of its application, be confined within very narrow limits indeed. Lord Lyndhurst represents Lord Mansfield as "laying down, in the "most broad and general terms," the rule that, "in "criminal cases, where there is a general verdict of "guilty, if one count is good it is held to be sufficient."* Now, if an indictment consist of as few as even two counts, each charging a really distinct offence, and the defendant is found guilty upon them both, it is of course the unquestionable duty of the Court, in passing sentence upon the person, to inflict some punishment for each of the offences of which he has been found guilty. It is, of course, impossible to presume that any Court would be so flagrantly mindless of its duty as to pass sentence for only one offence alone : some punishment must be awarded in reference to each. It is therefore impossible to entertain for a moment such a theory with respect to any such case, as that the Court, upon ascertaining that there was one good count in the indictment should proceed to give its judgment, with-

* Judgment, p. 2.

out any reference to the actual or possible badness of the others. The "impression" or "notion" therefore, about one good count being sufficient to support a judgment, must be obviously false, in reference to any case, except those in which the indictment, although containing various counts, imputes only one individual offence, which is charged in different ways, in order to meet the possible contingencies of the evidence. Now the indictment in the case of the *Queen v. O'Connell* contained six charges, UNQUESTIONABLY AND OBVIOUSLY DISTINCT, and could not, therefore, by any possibility, be included within the operation of the "impression." The slightest examination, therefore, of the alleged rule and of the actual record, are sufficient to show that from the operation of the rule must of necessity be excluded, at least, one class of cases, and that within that class the case of *O'Connell v. The Queen* is most unquestionably included, so that after all the assertions and all the denials which were made upon the subject, of the existence and meaning of this apocryphal principle, it finally turns out that whatever degree of credit is to be given to it, the extent of its application falls obviously short of the case actually before the Court.

Such was the course of negative and inconsiderate usage in the administration of criminal justice which Lord Brougham called the "practice of ages," because it had existed for some years, unamended and undetected; a practice under which a man may

be convicted and punished upon an indictment charging several offences, without being ever able to ascertain with precision or certainty in what respect it was that he transgressed against the law*, or for what offence it was that he suffered punishment; a practice, however, which the House of Lords very properly abolished, by reversing the judgment of the Queen's Bench in Dublin, in the case of the Queen v. O'Connell, and pronouncing a decision which has undoubtedly received, since its delivery, the deliberate and sometimes reluctant approbation of the whole Bar in this country.

Such was the conclusion of a contest, in which the Government was routed with a more disastrous and a more total defeat than was, perhaps, ever exhibited in the result of a crown prosecution before — a prosecution which was commenced and conducted with “a prodigality of blunders†,” but with a scarcity of justice, which in England and in modern times appear perfectly prodigious — a prosecution which not only failed to produce the results or establish the principles for which it was professedly

* “Such was the system under which,” as Lord Campbell observed (Judgment, p. 7.), “the framer of an indictment, having got *one count good in law*, goes on to draw others upon the same or different subjects, more and more vague and attenuated, and requiring less and less proof, until the accused becomes involved in the most perplexing generalities, and finds the greatest difficulty in ascertaining what is the charge to be repelled.”

† “Times” Newspaper.

instituted, but which completely succeeded in producing consequences and establishing principles diametrically opposite. The Solicitor-General expressly stated that one object of the prosecution was to suppress the Repeal Association. But although the Chief Justice called it, jocularly, "a society for the diffusion of useful knowledge," and complained, seriously, that it did not circulate "the 'Evening Mail' or any other paper of that sort," Mr. Justice Crampton expressly declared upon the bench, and in the presence of the whole Court, that the Attorney-General had not, in the course of the prosecution, *made any imputation upon its legality*; and so little does any body now imagine it to be illegal, that the Earl of Devon, in the very first page of the recent Report of the Irish Land Commission, expressly and directly informs her most gracious Majesty that the commissioners had received several documents and witnesses from the "*committee of the Repeal Association*," which he mentions in the ordinary way, as if speaking of one of the organised and acknowledged institutions of the country, and which is the very first body which he specifically mentions as having made any communication to the commissioners. "We want," says the Solicitor-General to the Court of Queen's Bench, "to put down this illegal association." "We beg leave," says the Earl of Devon to the Queen herself, "to inform your Majesty that we have received communications from the Repeal

“ Association, the boards of guardians of different “ unions, and the bishops of the Established Church.” Such is the result of the prosecution with respect to the Association.

Let us now see what sort of success attended it in reference to the other great purpose of the Government. The principal part of the indictment, that to which alone any real importance was attached by any body, was the portion which related to the Monster Meetings of 1843. It was for the purpose of procuring a decision against the legality of those meetings that the whole proceedings were set on foot. Nobody can believe that the Irish crown lawyers did not introduce into the counts relating to those meetings as much intensity of allegation as the circumstances would bear. Yet the final result of the prosecution upon this point is, that the judges and the law lords of England have decided by a majority of thirteen to one — every one else to Lord Brougham — that those allegations are totally worthless, and that the charge upon that subject amounts to no offence at all.

The prosecution must have been advised by the Lord Chancellor of England, and the purpose of it is known to all mankind to have been, to punish the multitudinous meetings; yet the Lord Chancellor himself now declares, not *obiter*—not accidentally or inconsiderately, but as laying and constituting the very foundation of his argument, that the parts of the indictment which relate exclusively to those

meetings, contain no imputation of any conduct which the law forbids—that the conduct imputed to the defendants in those counts,—to use the very words of the Lord Chancellor himself—“*does not constitute ANY OFFENCE KNOWN TO THE LAW* *,” however offensive it may be to the Cabinet.

But although every meeting is to be considered a lawful one until the reverse has been proved, we do not mean to assert that the decision which we have mentioned is in itself sufficient to prove the meetings in question to have been lawful. Taking, however, into consideration the whole of the subject, including the facts as well as the law of the case, we have no hesitation in expressing our own opinion, that the prosecution of Mr. O'Connell has demonstrated the utter impossibility of sustaining any imputation of illegality against the multitudinous meetings of 1843.

But the Government did not, in fact, venture to raise any direct issue upon the point at all. For, instead of indicting the defendants for attending illegal assemblies, they instituted a speculative prosecution upon a constructive imputation, from which in any event it could only be conjectured with more or less probability, that the meetings were, or were not, considered to be unlawful, but in which no direct or express decision could be given upon that point. Instead of making each individual re-

* Judgment of the Lord Chancellor, p. 3.

sponsible for the alleged illegalities of his own conduct, they hustled nine defendants together into the same dock, by which "manly and straight-forward conduct" one defendant was made responsible for not only what had been done by himself, but for every thing that had been done without his assent or his knowledge, not only by every other defendant, but by hundreds of other persons, of whom he had never heard, and of whom he knew no more than he did of the man in the moon.

The effect of this tortuous iniquity has been, however, exactly the same as must, according to the Solicitor General, have resulted from a direct, open, just, and constitutional course of action. It has been "triumphantly resisted, and deservedly defeated," and the very general who anticipated the triumph, has been reduced to the necessity of acting himself as the herald of his own defeat.

The success of the prosecution in other particulars has been exactly of the same kind. Upon a charge of inducing the people of Ireland to withdraw their confidence from the courts of justice—or at any rate of law—in that country, the defendants were dragged in "a mass" into the "focus" of the most important of those courts, in which the alleged offence was treated, not as an injury to the public, but as the invasion of a monopoly, and in which the Chief Justice deprecated the introduction of arbitrators in the same spirit in which Mr. Miles protests against the importation of lean cattle

from Holstein — as if a client law were as necessary as a corn law, and the principles of protection were equally applicable to lard and litigation — to the admission of grease and the administration of justice.*

But the commercial narrowness, which viewed clients only in the relation of customers, was not the worst part of the exhibition. The public at large, and especially the professional portion of it, saw with astonishment that the Court of Queen's Bench in Dublin uniformly, deliberately, and pertinaciously refused a series of applications, made upon the part of the defendants, whilst the ordinary law reports of the newspapers in London were alone sufficient to show, that these applications would be granted in this country as a matter of course, and of right. To these motions in general may be applied the observation made by Lord Denman, with respect to one of them in particular † — that for the amendment of the packed panel: “The motion was refused, upon what ground I do not know, for I have read nothing of these proceedings, except what I have seen in the papers which have been printed for our use. *But as I understand the facts*, I must take the liberty of saying *that it would STARTLE ANY COURT IN ENGLAND to hear that such a motion as that should be refused.*” Even the Lord Chancellor himself intimates ‡ that

* See the recent debates in the House of Commons.

† Judgment, by Mr. Leahy, p. 17.

‡ Judgment, p. 8.

the relief required by that motion ought to have been granted by the Court below, having, in the course of the argument in the House of Lords, expressly declared—what of course was well known even without such declaration—that the fraudulent and illegal concoction of the jury panel was acknowledged by the Attorney-General upon the record.

It must be admitted that there is nothing very extraordinary in one Court giving a different judgment from another, upon a subject which is proper for the adjudication of both. It is, however, not impossible that the people of Ireland, applying to the conduct of the tribunal which tried the defendants the same principles which were applied by the tribunal to the conduct of the defendants themselves, may suppose that they had some reason for concluding that the “series” of the decisions, like the series of the meetings, exhibited a “*continuity* and *unity* of purpose,” from which inferences may be drawn as well warranted at least as those which the Crown prosecutors drew from the number and succession of the meetings; and that the indubitable effect of prosecuting Mr. O’Connell, for endeavouring to diminish the confidence of the Irish public in the administration of justice, was to render that confidence much less than before, and to induce a belief that there now exists a justification for the antecedent suspicion. This futile and absurd attempt to repress, in modern

times, by the feeble means of a legal formality, the irresistible expansion of public opinion upon a subject of such transcendant interest to the community, has, moreover, had the effect of drawing the following most important opinion from the exalted magistrate, who enjoys in perhaps a greater degree than any individual ever did before, the confidence and admiration of the whole community, of every class and of every party:—"In the first place, it is my bounden duty to state that I do not entirely agree with the learned Judges in thinking that there are *only* two objectionable counts; it appears to me that there are *other counts open to very serious objection*, and I should be sorry to preclude myself by any thing which I may now say from giving a *judicial opinion* against counts so generally stated, and charging as an unlawful act a conspiracy to excite dissatisfaction with the existing tribunals, for the purpose of procuring a better system. *I am by no means clear that it may not be an INNOCENT and a MOST MERITORIOUS ACT; I am by no means clear that there is any thing illegal involved in EXCITING DISAPPROBATION OF THE COURTS OF LAW, FOR THE PURPOSE OF HAVING OTHER COURTS SUBSTITUTED, more cheap, efficient, and satisfactory.*" *

Such an opinion, proceeding from such a quarter, will be very slightly countervailed by the statement of Lord Brougham, that what all the judges decided

* Judgment of Lord Denman, edited by Mr. Leahy, p. 19.

to be only a display of large numbers in favour of a change in the law was an indictable offence — a doctrine by the force of which every instance of effectual or extensive political co-operation would become transmuted into a seditious conspiracy ; and in a country professing to be governed in accordance with public opinion, all changes in the laws or policy of the state would become unattainable in the direct ratio in which they were desired by the public. With regard to the feelings of ill-will which had been excited in the minds of the Irish towards the English people, as they were increased by the temporary and partial success, they have been altogether annihilated by the total and final defeat of the prosecution, which in every respect has established the legality of the bodies which it treated as illegal, has justified the complaints which it attempted to repress, and increased the evils which it pretended to extinguish.

Such was the position in which the *subject-matter* of the prosecution was left in the result. With regard to the principal prosecutor himself, his condition at the bar of the House of Lords was the most humiliating and the most deplorable that can be imagined as existing in such a case ; and however little may be the dignity which could be attributed to his position, or the commendation which could be given to his conduct in the earlier part of the proceedings, “ the last stage of the man was most undoubtedly much worse than the former.” The Attorney-

General was present in the Court of Queen's Bench in Dublin upon the 12th of February, 1844, and heard the whole Court publicly compose the forms of the findings, which were to be signed by the jury. He assisted personally in the composition, and heard the Court itself declare the findings to be faultless, and knew that the Court considered them to be such. He saw them handed up to the jury box from the bench, and saw them handed back to the bench from the jury box, and received without the slightest objection or intimation of an objection. He subsequently heard an application to amend the *postea* by adding some findings to those which existed already. He saw that neither upon that occasion or upon any other was any objection made as to the goodness of the findings upon the first four counts of the indictment. He resisted the motion, and was upon that, as upon every other occasion, supported by the judges. He opposed the motion in arrest of judgment, and contended that every count in the indictment was faultless. He was present when the judges decided in his favour, and heard with his own ears every one of those learned persons declare that every count in the indictment was good; but that the sixth and seventh counts were preeminently so, and altogether unexceptionable. In delivering judgment upon the motion in arrest of judgment, Mr. Justice Perrin expressly declared that he concurred in refusing the motion, upon the ground that the "sixth and

seventh counts were unexceptionable." Mr. Justice Crampton thought it unnecessary to enter into the merits of the first five counts, upon the ground that the sixth and seventh were "legally good and sufficient in substance and in form," whilst the Lord Chief Justice declared *every count* of the indictment to be good and sufficient in law, and "*particularly* "THE SIXTH, SEVENTH, and remaining ones."

He was afterwards present when the sentence was pronounced, and with his own ears heard the senior judge of that court, in the presence of the Chief Justice and the two other judges, declare emphatically and repeatedly that the greatest part of the punishment was awarded in respect of the monster meetings: that, to use the language of Mr. Justice Burton, in delivering the judgment, the "*main offence* imputed to the traversers was, that "they had conspired to procure the Repeal of the "Union by intimidation to be produced by the exhibition of great physical force."

Yet this identical individual afterwards came to the bar of the House of Lords, and requested that House to confirm the judgment of the Court below upon the ground that *the Court below took into consideration the badness of the counts and of the findings* (which he knew that they considered to be *immaculate*), and that they awarded *no punishment* in respect to that part of the charge which he heard the Court itself declare to be the "*main feature*" in the offence ;—asking for the judgment

of the House upon pretences which he *knew* not only to be totally destitute of any foundation, but to be *diametrically opposite to the fact*. It is worthy of notice, that from this very peculiar conduct of the right honourable and learned gentleman, a consequence was drawn by Lord Denman, which completely annihilated one part of the general argument upon the side of the prosecution. After showing the absurdity of the use which had been made of the doctrine of estoppel upon that side, the noble and learned lord observed* : — “ It is, however, no easy matter to estop the Crown in any of its legal proceedings. The difficulty is greatest in criminal prosecutions, where any one may employ the name of the Crown in accusing and bringing to trial. And what is to estop the Crown in the case supposed? The fact of the party having been adjudged guilty of this offence. Yet *the whole argument has been to show, that as this offence was ill laid in the indictment, you must presume that no such judgment could have been pronounced*. I confess, however, that ‘estoppel’ is to me a word *without meaning*, if this judgment now under investigation can be maintained by the reasoning adduced in support of it; *for how could that doctrine at any time and under any circumstances apply more strongly than at the present moment, when the first law officer of the Crown in Ireland is NOT ESTOPPED FROM ATTACKING THAT INDICTMENT, PREFERRED BY HIM-*

* Judgment, p. 45.

“SELF, AND ON WHICH, IN ALL ITS PARTS, HE HAS
 “OBTAINED A VERDICT OF GUILTY, AND A SENTENCE
 “*of fine and imprisonment?*”

In these observations, Lord Denman refers more especially to the subject of the counts. In reference to the findings, Lord Campbell observes*, “With respect to the unauthorised findings, your Lordships are asked to *presume* that the Judges of the Court of Queen’s Bench in Ireland were well aware that there was no sufficient verdict upon any of those counts, and awarded no punishment in respect of any of them. This, again, would be a presumption against the fact as well as against the averment upon the record: for *complaint was made at your Lordships’ bar* by the learned counsel for the Crown that *no objection had been taken to those findings in the Court below*, and it is quite clear that there was no misgiving in any quarter in respect to them until this writ of error. In truth, the counts in question [so ill found] contain the most serious charges, including some, as the charge to excite disaffection in the army, which are *not repeated* in any of the good counts on which there is a valid verdict. We cannot *resort to the* PALPABLY INCREDIBLE FICTION, *that the Judges, in violation of their duty*, did not consider the guilt of the defendants aggravated by the charges in these counts, and proportionally increase their punishment.”

* Judgment, p. 7.

But the argument upon the part of the prosecution at the bar of the House of Lords, was not only in direct opposition to the argument in the Court below, but was in equally direct opposition to itself. And the same parties who were obliged to assert, contrary to their own knowledge of the fact, that *the badness of the counts and of the findings MUST have been taken into the consideration of the Court below* before the pronouncing of the judgment, contended, at the same time and in the same place, that *there was NO BADNESS either in the counts or in the findings at all.**

It is impossible for us to conjecture what apology could be adduced upon the part of the Government for having endeavoured to procure the judgment of the House of Lords, for continuing the incarceration of their political antagonist, upon grounds, which, as every body is aware, they themselves personally knew to be diametrically opposite to the fact. Equally difficult is it for us to conceive why no public effort has been made hitherto, for the purpose of demanding an explanation upon the subject,

* "The questions raised hitherto" (which included the questions about the badness of the findings) "are here raised upon "the form of the record drawn up for consideration in this "House, and *do not involve any matter which occurred before the "Court of Queen's Bench in Dublin.*"—Argument for the Prosecution at the Bar of the House of Lords, Cl. & Fin. vol. xi. part 1. p. 219.

"As to the *supposed* confusion between the charges in the "counts and the findings upon them, it is submitted that there "is *none.*"—Ibid. p. 218.

in that House which can afford to bestow so much of its attention upon the importation of basket rods, bad butter, false teeth, and canary seeds.

Without attempting to depreciate the importance of those articles, we may be allowed to suggest that some notice may without impropriety be vouchsafed to such an object as that of asserting the principles of constitutional freedom, and vindicating the purity of the administration of justice; and we cannot even yet abandon the hope, that some parliamentary enquiry will be made into the monstrous prosecution, the character of which we have attempted to delineate, and the success of which would inevitably have left every degree of the liberty of speech, of writing, and of political action in Ireland, for all future time, at the mercy of the Crown.

A P P E N D I X.

Affidavit of the Rev. T. Tierney, sworn and filed 16th April,
1844.

In the Court of QUEEN'S BENCH, Crown Side.

The Queen against Daniel O'Connell, John O'Connell,
Reverend Thomas Tierney, Thomas Steele, Charles Gavan
Duffy, John Gray, Richard Barrett, and Thomas Matthew
Ray.

THE Reverend THOMAS TIERNEY, of Lakelands, in the parish of Clontibret, and county of Monaghan, clerk, maketh oath and saith, that he, this deponent, never attended any meeting of the Repeal Association previous to the meeting on the 3d day of October, 1843; and this deponent saith, he admits that on the said 3d day of October this deponent did hand in the sum of 92*l.* and upwards as a contribution to the funds of the Repeal Association, in order to bring about, by legal and consitutional means, a repeal of the Union, and for no other purpose and with no other object; and deponent saith, that this deponent *had not during the year 1843, up to the 13th day of October in that year, being the time of this deponent's being held to bail in this case, ANY COMMUNICATION WHATSOEVER, either personal or otherwise, with ANY of the other traversers* named in the indictment in this cause, *save that in the said year 1843 this deponent wrote a letter from Clontibret, in the county of Monaghan, to the said Charles Gavan Duffy, who had been formerly on intimate terms with him, and who was, as this deponent believes, then in Dublin, inviting him to come to Clontibret to spend a*

few days with deponent ; but this deponent saith, that *Mr. Duffy did not comply with the invitation of this deponent* : deponent saith, that the meeting in the parish of Clontibret on the 15th of August, 1843, was convened by this deponent alone, for the only purpose and with the only object that a petition might be agreed upon to Parliament for the repeal of the Union ; and saith, that the Repeal Association did not in any manner whatsoever take any part with this deponent in convening that meeting, and this deponent made no communication to the Repeal Association of his intention to convene that meeting ; that at the meeting so convened at Clontibret by this deponent on the 15th of August, 1843, a petition to Parliament for the repeal of the Union was drawn up, agreed to, and read ; and this deponent positively saith, that he, this deponent, did not, on the 16th day of June, 1843, or any other day, or ever say to John M'Cann, one of the witnesses examined on the part of the Crown, on the trial of this cause, that the feeling towards repeal had extended itself to the army, that the army were favourable to repeal, and partook of the enthusiasm of the people, and that they could not be so easily led to spill the blood of their fellow men, even by the bayonet, for seeking redress of their grievances peaceably ; nor did this deponent on that occasion, or any other occasion, use any words to the said John M'Cann to any such purport or effect ; that this deponent did not on that occasion or ever speak to the said John M'Cann as to what the army had done in Spain, or say any thing to the said John M'Cann in respect of the army in this country, or in Spain, or in any other country, or any word to any such import or effect ; and this deponent saith, that he did not on that occasion or ever say to the said John M'Cann that if the Association did not ultimately attain its object, it had done so much, at least, that the country would get something else besides bayonets, or any words to any such import or effect ; and deponent saith, that in the said conversation which passed between this deponent and the said John M'Cann on the said 16th of June, this deponent, in reply to a question from the said John M'Cann as to when the Clontibret meeting would take place, informed him that the time had not been fixed ; this deponent most positively saith, that he did not on the 13th day of February, 1843, or on

any other day or on any other occasion, combine, conspire, confederate and agree with the said other traversers in the indictment in this cause named or with any of them, or with any other person or persons whatsoever for or any of the purposes charged in the indictment, or for any purpose whatsoever ; and deponent saith, that in attending the said meeting of the Repeal Association on the said 3d of October, 1843, this deponent was utterly ignorant of there being any conspiracy ; and deponent positively saith, that in attending such meeting, he did not in the slightest degree intend to become a party to any conspiracy or illegal association whatever ; and deponent verily believes NO SUCH CONSPIRACY as that charged in the indictment in this case EVER EXISTED, or was ever entered into by any of the parties charged therewith.

THE END.



